Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

OREGON TROLLERS ASSOCIATION; SIUSLAW FISHERMEN'S ASSOCIATION; THOMAS HARRIS; JAMES MOORE; JIM GAGNON; JOHN FRASER; GARTH PORTEUR; STAN JONES; RUSSELL OTT; DONALD JACOBS; GREAT AMERICAN SMOKEHOUSE AND SEAFOOD COMPANY; CAP'N ZACH'S CRAB HOUSE; ZACH ROTWEIN; PAT HOUCK; and DAN MORRIS,

Petitioners,

v.

CARLOS M. GUTIERREZ, Secretary of the United States Department of Commerce; NATIONAL MARINE FISHERIES SERVICE (NMFS); WILLIAM T. HOGARTH, NMFS Director; and D. ROBERT LOHN, NMFS Regional Director for the Northwest Region,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a federal agency create time constraints that establish a rulemaking procedure that will never comply with the prior public notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553(c), and the Magnuson-Stevens Fishery Act, 16 U.S.C. § 1854(b)(1), and thereby prohibit the regulated industry from ever having the opportunity to provide the agency with prior public comment?

2. Does the Magnuson-Stevens Fishery Act, 16 U.S.C. § 1801, *et seq.*, allow the National Marine Fisheries Service to base its annual West Coast Chinook salmon harvest regulation on only those Chinook that will spawn naturally and ignore overwhelming numbers of hatchery Chinook, thereby imposing an artificial harvest quota that shut down the West Coast Chinook fishing industry?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Oregon Trollers Association and Siuslaw Fishermen's Association, nonprofit corporations organized under the laws of the State of Oregon, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Oregon Trollers Association, Siuslaw Fishermen's Association, Thomas Harris, James Moore, Jim Gagnon, John Fraser, Garth Porteur, Stan Jones, Russell Ott, Donald Jacobs, Great American Smokehouse and Seafood Company, Cap'n Zach's Crab House, Zach Rotwein, Pat Houck, and Dan Morris (Fishermen) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Fishermen filed this action in the district court on June 3, 2005. The Fishermen sought a declaratory judgment of the National Marine Fisheries Service's (NMFS) legal authority concerning the agency's 2005 Chinook commercial harvest regulation, published at 70 Fed. Reg. 23,054 (May 4, 2005). The July 6, 2006, Ninth Circuit Court of Appeals' opinion is reported at *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104 (9th Cir. 2006). The Ninth Circuit's opinion and judgment is reproduced herein at Appendix (App.) A. The district court's opinion is included herein at App. B.

JURISDICTION

This case was filed in the United States District Court for the District of Oregon. The statutory basis for the district court's jurisdiction was 28 U.S.C. § 1331, due to the presence of a federal question; 28 U.S.C. § 2201 (declaratory relief); 16 U.S.C. § 1855(f) of the Magnuson-Stevens Fishery Act, 16 U.S.C. §§ 1801-1882; and the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.* This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS AT ISSUE

The Administrative Procedure Act (APA) provides in pertinent part:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.

5 U.S.C. § 553(c).

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> . . .
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b).

The Magnuson-Stevens Fishery Act (Magnuson Act) provides in pertinent part:

> Commercial . . . fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities

16 U.S.C. § 1801(a)(3).

> It is therefore declared to be the purposes of the Congress in this chapter—
>
> . . .

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles.

16 U.S.C. § 1801(b).

It is further declared to be the policy of the Congress in this chapter—

. . .

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens.

16 U.S.C. § 1801(c).

The term "fish" means finfish . . . and all other forms of marine animal . . . life other than marine mammals.

16 U.S.C. § 1802(12).

The term "fishery" means—

(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and

(B) any fishing for such stocks.

16 U.S.C. § 1802(13).

> The term "fishing community" means a community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew and United States fish processors that are based in such community.

16 U.S.C. § 1802(16).

> The term "stock of fish" means a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

16 U.S.C. § 1802(37).

> To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

16 U.S.C. § 1851(a)(3).

> Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

16 U.S.C. § 1851(a)(8).

> (A) . . . the Secretary shall publish such regulations in the Federal Register . . . for a public comment period of 15 to 60 days . . . .

16 U.S.C. § 1854(b)(1).

Federal regulations require the National Marine Fisheries Service to

> identify affected fishing communities and then assess their differing levels of dependence on and engagement in the fishery being regulated.

50 C.F.R. § 600.345(c)(3). And

> assess the likely positive and negative social and economic impacts . . . on fishing communities . . . . [and] identify those alternatives that would minimize adverse impacts.

50 C.F.R. § 600.345(c)(4)-(5).

STATEMENT OF THE CASE

This controversy involves the viability of the Klamath River fall Chinook salmon stock and the West Coast fishing industry and communities dependent on the commercial troller Chinook salmon fishery. Although no one knows precisely when salmon fishing started in the Pacific Northwest, Lewis and Clark observed Indians catching salmon on the Columbia River in 1805. John V. Byrne, *Salmon Is King—Or Is It?*, 16 Envtl. L. 343, 346 (1986). Over a century later, Congress determined that "[c]ommercial . . . fishing constitutes a major source of employment and contributes significantly to the economy of the Nation" and that "[m]any coastal areas are dependent upon fishing and related activities." 16 U.S.C. § 1801(a)(3).

In order to protect this important aspect of the American culture and economy, Congress enacted the Magnuson Act expressly "to promote domestic commercial . . . fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(3). In doing so, Congress intended to "assure that the

national fishery conservation and management program utilizes, and is based upon, the best scientific information available" and, just as importantly, "is responsive to the needs of, interested and affected States and citizens." 16 U.S.C. § 1801(c)(3). Accordingly, Congress mandated in the Magnuson Act that the responsibility to allow public comments is the National Marine Fisheries Service's (NMFS) obligation: "[NMFS] shall publish [fishery] regulations in the Federal Register . . . for a public comment period of 15 to 60 days." 16 U.S.C. § 1854(b)(1)(A).

NMFS' harvest regulations affect tens of thousands of West Coast families and small business owners annually. Fishermen whose livelihoods NMFS regulates must have the ability to provide public comment on the regulations that govern the fishing industry, and NMFS has the obligation of allowing them to do so. Nonetheless, NMFS does not afford the Fishermen public comment and fails to hear or address the Fishermen's concerns regarding NMFS' harvest regulations.

Instead, for the last 21 years, since 1985, NMFS has refused to allow the public prior notice and comment on its harvest regulations, claiming that good cause exists under the APA to avoid the requirement because data collection and time constraints rendered complying with the requirement "impracticable." *See*, *e.g.*, 70 Fed. Reg. 23,054-61, 23,063 (citing 5 U.S.C. § 553(b)(3) (exempting regulations from the APA's public notice and comment procedures, but only when notice is not required by statute)).[1] Describing the process of promulgating the harvest regulation as "complex" and time-sensitive, NMFS claims that allowing the fishing industry the opportunity to comment on the harvest regulations that govern their livelihoods, if not their lives, requires too much time. *Id.* As a result, NMFS' 2005 Chinook commercial harvest regulation (2005 Harvest Regulation) decimated the

[1] App. A-34, 35.

West Coast fishing industry and communities that rely on the industry,[2] and contravened Congress' purpose in the Magnuson Act of protecting the fishing way of life and the economies that support and rely on the fishing industry.

Moreover, by basing its 2005 Harvest Regulation only on numbers of "naturally spawning" Chinook and ignoring the multitude of hatchery Chinook, NMFS unnecessarily restricted the entire Pacific Chinook commercial troller fishery south of Cape Falcon, Oregon, to the detriment of West Coast fishing communities. Yet, "[h]atcheries have an ancient lineage dating to the Romans who first artificially cultivated seagoing fish as a method of augmenting natural populations." Joseph A. Brown, *Commercially Harvesting Endangered Salmon? Rethinking the Interaction of Salmon Hatcheries and the Endangered Species Act After Alsea Valley Alliance v. Evans*, 40 Ga. L. Rev. 253, 262 (2005). Specifically in the Pacific Northwest, salmon hatcheries have existed since 1877. Byrne, *supra*, at 343. Despite these facts, NMFS based its 2005 Harvest Regulation on only a portion of the relevant Chinook population—specifically, those Chinook that would spawn naturally.

A. Factual Background

On May 4, 2005, NMFS promulgated its 2005 Harvest Regulation by publishing it in the Federal Register. 70 Fed. Reg. 23,054. Since 1985, NMFS has claimed in its harvest regulations that good cause exists under the APA to waive the public comment requirement, contending it cannot allow the public to comment on its regulations because it is "impracticable." 70 Fed. Reg. 23,054, 23,063. Describing the process of promulgating the regulations as "complex" and time-sensitive, NMFS contends that providing the fishing

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[2] App. A-8, 9.

industry the opportunity to comment on its harvest regulation would require too much time. *Id.*

In addition, although a multitude of Chinook existed in the Pacific Ocean available for harvest, naturally spawning Klamath River fall Chinook consisted of only a fraction of the entire Chinook population. Hatchery and naturally spawning Chinook exist side-by-side in the same ocean, yet the Fisherman were forced to drastically curtail fishing of all Chinook despite near record numbers of Chinook. Because NMFS did not base the Chinook harvest on the entire Chinook population, NMFS set a harvest quota without either legal authority or consideration of the impacts the fishing industry would suffer as a result.

B. The Lower Court Decisions

The Fishermen claimed, in part, that (1) because NMFS distinguished between hatchery and naturally spawning Chinook, NFMS' 2005 Harvest Regulation exceeded NMFS' authority by violating the Magnuson Act's clear terms; (2) NMFS violated Standard Eight of the Magnuson Act by failing to properly consider the economic harm the 2005 Harvest Regulation would cause; (3) NMFS violated Standard Ten of the Magnuson Act because its 2005 Harvest Regulation failed to promote the safety of the Fishermen's lives at sea; and (4) NMFS improperly exempted the 2005 Harvest Regulation from the APA's public comment requirements.[3]

The district court denied the Fishermen relief.[4] The district court found that: (1) the Fishermen's first three claims were time-barred under the Magnuson Act, but would fail even if they were not time-barred; (2) NMFS did not violate Standards Eight and Ten of the Magnuson Act; and (3) NMFS'

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[3] App. B-12, 13.

[4] App. B-34, 35.

statement of good cause was sufficient to except its harvest regulation from the APA's public comment requirement; and, thus, (4) NMFS did not violate the RFA.[5]

The Ninth Circuit reversed the district court's decision in relevant part.[6] The Ninth Circuit held that, despite the fact NMFS defined the Klamath Chinook stock to include both naturally spawning and hatchery Klamath Chinook, NMFS could manage naturally spawning Klamath Chinook as a separate stock.[7] In addition, the court held that NMFS properly invoked the "impracticable" exception to the APA's public comment requirement.[8]

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN NMFS' RULEMAKING PROCESS CONCERNING ITS HARVEST REGULATIONS AND CONGRESSIONAL INTENT BEHIND THE APA

"The procedure of administrative rule making is one of the greatest inventions of modern government." *Nat'l Nutritional*

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[5] App. B-14 to 34.

[6] The Ninth Circuit reversed the district court's decision finding the Fishermen's claims were time-barred under the Magnuson Act's statute of limitations, but affirmed the district court's determination of the merits. App. A-10 to 17.

[7] App. A-19 to 27.

[8] App. A-31 to 35.

Foods Ass'n v. Kennedy, 572 F.2d 377, 383 (2d Cir. 1978) (citing Kenneth Culp Davis, *Administrative Law Treatise* § 6.15 (supp. 1970)). As a check on the unelected "fourth branch of government," section 553 of the APA ensures that the concerns of citizens impacted by government regulations are represented. The APA's legislative history establishes that Congress recognized the importance of affording citizens participation through the public comment process before agencies in which the public's voice would otherwise be unheard: "[P]ublic participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interests." *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980) (quoting S. Doc. No. 79-248, at 19-20 (1946)). Indeed,

> the essential purpose of according section 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.

Batterton, 648 F.2d at 703. Prior public notice and comment procedures "also enable[] the agency promulgating the rule to educate itself before establishing rules . . . which have a substantial impact on those regulated." *Texaco, Inc. v. Fed. Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969).

Given these important purposes, Congress excused federal agencies from the APA's prior public notice and comment procedure only when the agency finds and explains that for good cause public comment is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(3)(B). The legislative history and the purposes section 553 serves demonstrate that Congress intended the exceptions in section 553(b)(3)(B) to be narrow ones. *Nat'l Nutritional Foods Ass'n*, 572 F.2d at 384.

According to Congress, first, for public comment to be "impracticable," the circumstances must be such that allowing public comment would unavoidably prevent NMFS from executing its functions. *Id.* at 385 (citing S. Rep. No. 79-752, at 200 (1945) and H.R. Rep. No. 79-1980, at 258 (1946)). Absent such circumstances, no amount of explanation can establish impracticability and, thus, good cause to avoid Congress' APA requirements. Second, the APA's exception to the prior public comment requirement does not apply when public notice is required by the relevant statute under which the regulation is promulgated. *See* 5 U.S.C. § 553(b); *see also* 16 U.S.C. § 1854(b)(1) (requiring public comment concerning fishery regulations).

Congress intended that the exceptions to the APA's obligations be extremely narrow because

> Congress was alert to the possibility that these exceptions might, if broadly defined and indiscriminately used, defeat the section's purpose. Thus, the legislative history of the section is scattered with warnings that various of the exceptions are not to be used to escape the requirements of section 553. Further the Senate Committee responsible for considering the APA concluded its report by investing courts with a "duty . . . to prevent avoidance of the requirements of the bill by any manner or form of indirection . . . ." We would not be true to that duty if we allowed the Secretary to ignore the requirements of section 553 when promulgating rules which, like the present one, substantially affect private parties and resolve important issues without the beneficial input that those parties could provide.

Nat'l Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 950 (D.C. Cir. 1982) (holding that even though the

disruption caused by the rule might not persuade the agency to rescind the regulation, the potential impact was such that the fairness element of section 553 required the agency to allow regulated parties to present their case to the agency before it acted) (citations omitted).

In conflict with Congress' express command, NMFS has established a rulemaking process based on artificial constraints that allowed it to forego prior public notice and comment, not just in 2005, but for the *last 21 years*.[9] Under this regime in place since 1985, NMFS does not allow prior public notice and comment on its regulations but, instead, habitually claims year after year that it does not have time to comply with Congress' important APA protections. As a result, for the last two decades NMFS has denied the West Coast Chinook fishing industry the opportunity to provide prior public comment on the regulations governing the industry.

NMFS claims that the data on which it bases its harvest regulations are not available until January and February of each year because Chinook spawning occurs through the fall. 70 Fed. Reg. 23,054, 23,063. In addition, NMFS claims the process of analyzing the prior year's harvest and setting the current year's harvest cannot be completed until early April. *Id.* Contending the current year's harvest season must begin by May 1, NMFS states it has only a month to finalize the harvest regulation. *Id.* Finally, NMFS concludes, annually:

> Delaying implementation of annual fishing regulations . . . for an additional 60 days would require that fishing regulations for May and June be set in the previous year without knowledge of the current stock status.

Id.

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[9] App. A-34, 35 (citing harvest regulations dating to 1985 in which NMFS has not allowed prior notice and public comment).

With these artificial time constraints, NMFS has established a rulemaking process that, for the last two decades, has allowed it to escape the APA's prior notice and comment obligation Congress placed on federal agencies. Moreover, NMFS' rulemaking regime prohibits the regulated industry from *ever* providing the agency with prior public comments on the regulations governing the industry.

Yet, not only *can* NMFS comply with Congress' important APA requirements, it *has* done so in the past. From 1978 to 1983, NMFS promulgated harvest regulations based on annual salmon abundance estimates and social and economic factors affecting the industry and, furthermore, allowed prior public notice and comment.[10] NMFS claimed the process was "too cumbersome to allow for timely implementation of the annual regulations and efficient fishery management."[11] Nonetheless, NMFS demonstrated it could manage the fishery under the process and did not claim that the process unavoidably prevented NMFS from executing its functions—instead claiming only that the process was "too cumbersome." *But see Nat'l Nutritional Foods Ass'n*, 572 F.2d at 385 (stating "impracticability" means the agency cannot both afford prior public notice and comment and perform its functions) (citing S. Rep. No. 79-752, at 200 (1945) and H.R. Rep. No. 79-1980, at 258 (1946)). Accordingly, no reason exists now that NMFS cannot merely comply with the APA's procedures and still manage the fishery. Quite simply, NMFS' administrative difficulties do not meet Congress' standard of "impracticability."

In addition, according to Congress, the APA's exception to the prior public comment requirement does not apply in this case because the Magnuson Act requires prior public notice and

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[10] App. A-3, 4 (citing 49 Fed. Reg. 43,766, 43,769 (Oct. 1, 1984)).

[11] App. A-4 (citations omitted).

comment. *See* 16 U.S.C. § 1854(b)(1) (requiring public comment concerning fishery regulations); *see also* 5 U.S.C. § 553(b) (exempting regulations from the APA's public notice and comment procedures, but only when notice is not required by statute). Thus, not only did Congress require NMFS in the APA to provide prior public notice and comment, but in the Magnuson Act Congress prevented NMFS from escaping the APA's requirements.

The two-pronged obligation Congress imposed through both the APA and the Magnuson Act demonstrates the urgency of allowing prior public notice and comment concerning fishery regulations. Indeed, the obligation underscores the fact Congress intended to "assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available" and, just as importantly, "is responsive to the needs of, interested and affected States and citizens." 16 U.S.C. § 1801(c)(3). Otherwise, without such an opportunity, the 2005 Harvest Regulation demonstrates that "[t]here is little doubt that the restricted salmon fishing season under the 2005 management measures imposed significant hardship on Pacific fishing communities."[12]

Moreover, Congress' Magnuson Act obligation to provide prior notice and public comments is quite modest—as little as 15 days. *See* 16 U.S.C. § 1854(b)(1)(A) ("[T]he Secretary shall publish such regulations in the Federal Register . . . for a public comment period of 15 to 60 days."). But NMFS has claimed annually, for the last 21 years, that it cannot comply with Congress' APA requirements because

> [d]elaying implementation of annual fishing regulations . . . for an *additional 60 days* would require that fishing regulations for May and June be

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[12] App. A-8, 9.

> set in the previous year without knowledge of current stock status.

70 Fed. Reg. 23,054, 23,063 (emphasis added). Yet, Congress did not impose on NMFS a strict 60-day prior public notice and comment requirement. Instead, cognizant of both the importance to the industry of prior public notice and comment and NMFS' need to issue timely annual harvest regulations, Congress flexibly allowed 15 to 60 days to comply with the APA's protections. NMFS states it cannot afford to allow 60 days for prior public notice and comment, but does not explain why it could not afford the minimum 15-day public comment period, even if it had to move its process forward by 15 days. Moreover, NMFS possesses a "mechanism for making preseason and inseason adjustments in the [harvest] regulations."[13] Thus, no reason exists that NMFS could not afford at least a 15-day prior public comment period given that, during the comment period, it could adjust the existing harvest regulation before the season or during the season.

The importance of NMFS adhering to Congress' APA requirement is evident in this case. NMFS "observed that the restricted season . . . would yield an expected $33.7 million in income for Pacific salmon fisheries, 'down 28% from the 2004 value of $46.8 million, and 74% below the 1976-1990 average.'"[14] Indeed, "[o]ne estimate pegged the loss caused to commercial fishermen and related businesses at $40 million," and "[s]everal of the individual plaintiffs in this suit attested to the threats the 2005 management measures posed to their livelihoods."[15]

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[13] App. A-4.

[14] App. A-8 (citations omitted).

[15] App. A-8, 9 (citations omitted).

NMFS' rulemaking process conflicts with Congress' intent behind the APA's important requirements, and the regulated industry pays the price. For these reasons, this Court should resolve this conflict by granting this petition to resolve the important question of whether NMFS may create artificial time constraints that establish a rulemaking procedure that will never comply with Congress' APA requirements, thereby prohibiting the regulated industry from ever having the opportunity to provide the agency with prior public comment.

II

THIS COURT SHOULD GRANT REVIEW TO SECURE UNIFORMITY AMONG THE CIRCUITS CONCERNING THE EXCEPTIONALLY IMPORTANT ISSUE OF THE ABILITY OF CITIZENS TO COMMENT ON REGULATIONS GOVERNING THEIR LIVELIHOODS

As noted, Congress commanded in the Magnuson Act that NMFS "shall publish [harvest] regulations in the Federal Register . . . for a public comment period of 15 to 60 days." 16 U.S.C. § 1854(b)(1)(A). Despite this congressional mandate, NMFS has claimed for 21 years that it possesses good cause under the APA to escape the public comment process concerning its harvest regulations due to time constraints.[16] However, NMFS' claims of good cause merely elevate form over function—in other words, if the *circumstances* for avoiding public comment do not establish good cause, then the explanation, no matter how verbose, is of no import.

In sum, the Ninth Circuit upheld NMFS' statement of good cause to exempt its harvest regulation by employing a very lax standard for establishing impracticability, stating:

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[16] App. A-33 to 35.

> The NMFS justified its decision with specific fishery-related reasons, not generic complaints about time pressure and data collection difficulties.[17]

Thus, under the Ninth Circuit's standard, an agency may establish impracticability merely by providing specific reasons for invoking the exception:

> [NMFS] observed that the data on which the management measures are based "are not available until January and February because spawning escapement continues through the fall[]." The [Pacific Fisheries Management Council] does not finish its process until early April, and the season must begin on May 1. The NMFS thus has only a month to finalize the Council's proposals.[18]

As a result, the Ninth Circuit applied a standard by which "complaints about time pressure" constitute impracticability, and thus good cause to avoid the APA's requirements.

As discussed in more detail below, other circuit courts of appeals apply exacting standards for determining whether impracticability exists to avoid the APA's protections. For example, the District of Columbia Circuit Court of Appeals requires either an "emergency situation[]" or an "imminent hazard." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Likewise, the First Circuit Court of Appeals applies a standard by which impracticability exists "when the agency could not both follow section 553 [of the APA] and execute its statutory duties." *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983) (citations omitted). In addition, both the Second and Third Circuit Courts of Appeals apply a standard similar to that of the First Circuit in which impracticability "means a situation in

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[17] App. A-33.

[18] App. A-34, 35.

which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings." *Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995); *accord American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977).

The Ninth Circuit should have employed the standards these other circuits utilize and rejected NMFS' avoiding Congress' important APA mandate. Instead, the Ninth Circuit relied on the verbosity of NMFS' explanation of good cause, rather than requiring NMFS to comply with its Magnuson Act and APA public comment obligation unless the requirement was indeed "impracticable." But, NMFS' excuse does not establish that an emergency situation exists or that allowing prior public comment would prohibit it from performing its statutory mandate to manage the fishery, as other circuits require. This Court should grant this petition to ensure uniformity among the circuits of the standard by which an administrative agency may habitually exempt itself from the APA's important protections.

A. The District of Columbia Circuit Court of Appeals Enforces Congress' Public Comment Mandate by Employing a Strict Standard for Impracticability, In Contrast to the Ninth Circuit

The District of Columbia Circuit Court of Appeals requires federal agencies to demonstrate the existence of either an "emergency situation[]" or circumstances involving an "imminent hazard." *Jifry*, 370 F.3d at 1179. Furthermore, the D.C. Circuit makes clear that these circumstances should be "indeed rare." *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 382 (D.C. Cir. 1983) (holding the Commission's inability to promulgate a final rule on time and its reluctance to place licensees in jeopardy of enforcement actions insufficient to constitute good cause)

(citing *American Fed'n of Gov't Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1157 n.6 (D.C. Cir. 1981)). Recognizing the importance of the APA's protections, the District of Columbia Circuit "has 'consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive.'" *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992) (holding public comment would have forced important issues into full public display and made for more responsible administrative action) (citing *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987)). Likewise, a "need to act swiftly" in order to "redress 'a serious breakdown in management controls'" "is not the type of exigent circumstance that comes within the narrow 'good cause' exception of section 553(b)(B)." *Chamber of Commerce of the U.S. v. SEC*, 443 F.3d 890, 907-08 (D.C. Cir. 2006) (citations omitted).

> Thus, in the D.C. Circuit, the good cause exception
>
> is "not [an] escape clause[] that may be arbitrarily utilized at the agency's whim. Rather, use of the[] exception[] by administrative agencies should be limited to emergency situations."

Tennessee Gas Pipeline Co. v. Fed. Energy Regulatory Comm'n, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (holding that fear of environmental damage that might result from a rush to avoid mandates of final rule was not sufficient to invoke good cause exception) (citations omitted).

On the other hand, the D.C. Circuit's standard recognizes the excuse of "impracticability" under only limited circumstances such "as when a safety investigation shows that a new safety rule must be put in place immediately." *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (holding impracticability did not exist where there was no threat to the environment or human health or that some sort of emergency had arisen). Likewise, under the D.C.

Circuit's standard, the Transportation Security Administration (TSA) had good cause to not allow prior public comment under the extraordinary circumstance where the agency possessed a "legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001." *Jifry*, 370 F.3d at 1179. Accordingly, public comment was unnecessary only where it

> could delay the ability of TSA and the FAA to take effective action to keep persons found by TSA to pose a security threat from holding an airman certificate and was necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States.

Id.

The circumstances of this case highlight the stark conflict between the D.C. Circuit's standard and the Ninth Circuit's opinion. An emergency circumstance, which the D.C. Circuit requires for impracticability, does not exist concerning NMFS' 2005 Harvest Regulation. NMFS could not allege that its harvest regulation involved an emergency situation. Nonetheless, the Ninth Circuit applied a lesser standard under which NMFS' excuse of time constraints sufficed as impracticability—despite the fact that, far from being "indeed rare" as the D.C. Circuit requires, it is the same excuse NMFS has provided for the last 21 years. Yet, according to the D.C. Circuit, even a "need to act swiftly" in order to "redress 'a serious breakdown in management controls' " "is not the type of exigent circumstance that comes within the narrow 'good cause' exception of section 553(b)(B)." *Chamber of Commerce of the U.S.*, 443 F.3d at 907-08 (citations omitted). As a result, unlike the D.C. Circuit's standard, the Ninth Circuit allows NMFS' escape clause to effectively swallow the APA's well-intentioned directive.

B. The First, Second, and Third Circuit Courts of Appeals Protects the Public's Right to Public Comment with a Strict Standard for Impracticability, In Contrast to the Ninth Circuit

Unlike the Ninth Circuit, the First Circuit Court of Appeals applies a standard by which impracticability exists "when the agency could not both follow section 553 [of the APA] and execute its statutory duties." *Levesque*, 723 F.2d at 184 (citations omitted). In *Levesque*, the Secretary of Agriculture argued good cause existed due to the need to implement new legislation, similar to NMFS' claim that it must implement its new harvest regulation. *Id.* However, the First Circuit characterized the Secretary's argument, in large part, as one based on "essentially lack of time." *Id.* Relevant here, the First Circuit noted that a presumption exists that "Congress expects agencies to comply with the APA, even at the expense of short statutory time constraints, unless the statute expressly dictates otherwise." *Id.* (citing *Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 885 (3d Cir. 1982)). Applying its standard to the facts of the case, the court held:

> Thus had Congress mandated implementation by October 1, there would still be some question whether that fact alone would provide good cause for dispensing with section 553 procedures. But Congress did not set any time constraints. The October 1 deadline the Secretary followed was his own creation and of no relevance to the question of good cause.

Levesque, 723 F.2d at 184.

Like the First Circuit, the Second and Third Circuit Courts of Appeals hold that impracticability exists only in situations of emergency or necessity where "the due and required execution of the agency functions would be unavoidably prevented by its

undertaking public rule-making proceedings." *Zhang*, 55 F.3d at 746; *American Iron & Steel Inst.*, 568 F.2d at 292. Unlike the Ninth Circuit, the Second Circuit holds that if

> the need to provide immediate guidance and information . . . constituted "good cause," then an exception to the notice requirement would be created that would swallow the rule.

Zhang, 55 F.3d at 746 (citations omitted).

For example, the Second Circuit has held that despite the fact the FDA was merely following an explicit congressional directive after a 14-year administrative process, the court held that "[t]he exception for impracticability is plainly unavailable." *Nat'l Nutritional Foods Ass'n*, 572 F.2d at 385. Instead, "[t]he due and required execution of the functions' of the FDA would hardly have been 'unavoidably prevented' by further public rulemaking . . . ." *Id.*

Under any of these standards, NMFS' alleged lack of time to allow prior public comment would not alone constitute impracticability sufficient to escape Congress' APA and Magnuson Act mandates. Indeed, according to the First Circuit, even were the "lack of time" not the result of NMFS' own deadline but instead due to congressional mandate, impracticability still would not necessarily be established. *Levesque*, 723 F.2d at 184. Thus, in the First Circuit, NMFS' excuse would not constitute good cause to avoid its APA obligation because any time constraint is of NMFS' own creation. This is particularly true given that NMFS can, and has in the past, both "follow[ed] section 553 [of the APA] and execute[d] its statutory duties." *See id.*

The First Circuit presumes that "Congress expects agencies to comply with the APA, even at the expense of short statutory time constraints, unless the statute dictates otherwise." *Levesque*, 723 F.2d at 184. Here, the Magnuson Act does not

dictate otherwise, but furthers that presumption by containing its own public comment mandate. 16 U.S.C. § 1854(b)(1)(A) ("[T]he Secretary shall publish such regulations in the Federal Register . . . for a public comment period of 15 to 60 days."). The Ninth Circuit should have employed a standard such as that in the First Circuit and upheld Congress' mandate to allow prior public comment on its regulations, rather than allow NMFS to avoid its obligation.

Similarly, in conflict with the standards of the Second and Third Circuits, the Ninth Circuit upheld NMFS' excuse on the ground the agency desired to provide immediate guidance and information, despite the fact public rulemaking proceedings would not have unavoidably prevented NMFS from executing its agency functions. *But see American Iron & Steel Inst.*, 568 F.2d at 292 (the need to provide immediate guidance cannot constitute good cause, lest the excuse swallow the exception). The Ninth Circuit's decision cannot be reconciled with the decisions of these other circuit courts. This Court should resolve the conflict in the circuit courts by granting this petition and addressing the important question of whether NMFS' time constraints establish "impracticability" such that NMFS may habitually avoid Congress' important APA and Magnuson Act protections.

III

THIS COURT SHOULD SETTLE THE IMPORTANT QUESTION OF WHETHER CONGRESS INTENDED IN THE MAGNUSON ACT TO ALLOW NMFS TO SHUT DOWN A FISHERY BY PREVENTING THE HARVEST OF MILLIONS OF HATCHERY CHINOOK IN ORDER TO PURPORTEDLY "CONSERVE" NATURALLY SPAWNING CHINOOK

NMFS bases its annual Chinook harvest regulation on an escapement goal of "35 percent of the potential adults from

each brood of natural spawners, but no fewer than 35,000 naturally spawning adults in any given year."[19] Hatchery spawners do not count toward this goal.[20] Thus, by basing its 2005 Harvest Regulation only on the fraction of "naturally spawning" Chinook and ignoring the multitude of hatchery Chinook, NMFS unnecessarily restricted the Pacific Chinook commercial troller fishery south of Cape Falcon, Oregon, to the detriment of West Coast fishing communities. For example, the Klamath River run after the 2004 fishing season, on which NMFS based the 2005 Harvest Regulation, consisted of 79,000 returning adult chinook.[21] However, of these, only 24,300 were natural spawners.[22] Thus, ignoring the more than 54,000 hatchery Chinook, NMFS instead based the 2005 harvest on approximately only 25% of the actual number of returning adult Chinook. The result was devastating to the West Coast fishing industry. *See supra* at 14-15.[23]

The Magnuson Act defines a "stock of fish" as "a species, subspecies, geographical grouping, or other category of fish

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[19] App. A-5 (The term "escapement" refers to those Chinook that will escape the harvest to spawn. Thus, NMFS' goal requires that 35% of the adult Chinook in a population return to spawn naturally, and no fewer than 35,000 naturally spawning adults in any given year.).

[20] App. A-5.

[21] App. A-6.

[22] App. A-6.

[23] Indeed, NMFS' similar 2006 Harvest Regulation, based on the same criteria, resulted in the Secretary of Commerce describing the fishery as having failed and declaring an emergency disaster declaration. *See* http://www.commerce.gov/opa/press/Secretary_Gutierrez/2006_Releases/July/Klamath.pdf#search='2006%20%26%20Chinook%20%26%2A%20Disaster%20Declaration' (last visited Oct. 26, 2006).

capable of management as a unit." 16 U.S.C. § 1802(37). Congress used singular and disjunctive terms to limit the definition such that the Klamath fall Chinook stock can consist only of either a *single* species, or subspecies, *or* geographical grouping, *or* other category of fish capable of management as a unit. *Id.* No dispute existed that the Klamath Chinook stock, including hatchery Klamath Chinook, consists of a single species. Indeed, NMFS has not defined the stock any other way, either as a "subspecies," "geographical grouping," or "other category." Thus, the key to this issue is that the Klamath Chinook stock, as NMFS defined it, includes *both* naturally spawning and hatchery Klamath Chinook.[24]

Accordingly, once NMFS included hatchery Klamath Chinook in the Klamath Chinook stock, the fact those Chinook begin their lives in a hatchery was irrelevant under the Magnuson Act. Regardless of their origin or spawning method, NMFS had no choice but to manage the entire Klamath Chinook stock, as NMFS defined it, as a unit throughout its management process. *See* 16 U.S.C. § 1802(37) (requiring that a stock consists of an entity "capable of management as a unit").[25] NMFS defined the Klamath Chinook stock, presumably considered all relevant scientific and biological

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[24] App. A-20, 21 (recognizing the "undisputed facts" that natural and hatchery spawners swim side-by-side and that, other than the harvest quota, NMFS does not distinguish between natural and hatchery spawners); App. A-19 (noting that "[s]ome hatchery-born salmon will spawn in the wild, and some salmon born in the wild will spawn in a hatchery").

[25] One could argue that the phrase "capable of management as a unit" does not necessarily mandate that the stock actually be managed as a unit. However, Congress' requirement that the stock be capable of being managed as a unit indicates its intent that it be so managed. Otherwise, absent such intent, no need would have existed to include the language.

factors—and *still included hatchery Klamath fall Chinook in the stock.* Thus, NMFS settled the issue by determining hatchery and naturally spawning Chinook should both be included in the Klamath Chinook stock.

But NMFS disregarded the Magnuson Act's clear definition of a "stock of fish" and treated naturally spawning Chinook as a separate category within the Klamath Chinook stock.[26] According to the Magnuson Act's clear definition of a "stock" and NMFS inclusion of both hatchery and naturally spawning Chinook in the Klamath Chinook stock, naturally spawning Chinook *cannot* constitute a separate category within the Klamath Chinook stock. As a result, NMFS' 2005 Harvest Regulation arbitrarily distinguished between hatchery and naturally spawning Klamath Chinook in setting the harvest quota.

However, Congress mandated that NMFS "exercise sound judgment in the stewardship of fishery resources . . . under circumstances . . . which take into account the social and economic needs of the States." 16 U.S.C. § 1801(b)(5). Yet NMFS' 2005 Harvest Regulation drastically reduced the 2005 Chinook harvest to an unprecedented level, decimating the fishing industry, the Fishermen's livelihoods, and West Coast fishing communities.

NMFS claimed its disastrous season closures were necessary due to low numbers of naturally spawning Klamath Chinook and the need to ensure that a minimum of 35,000 naturally spawning Klamath Chinook escaped the harvest to spawn naturally.[27] However, by ignoring the vast hatchery stocks, NMFS violated Congress' purpose in enacting the

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[26] App. A-21 ("There is nothing in the Act to suggest that natural spawners are not a 'division' or 'distinct class,' and hence a 'category,' of Klamath chinook.").

[27] App. A-8.

Magnuson Act that NMFS "exercise sound judgment in the stewardship of fishery resources . . . under circumstances . . . which take into account the social and economic needs of the States." 16 U.S.C. § 1801(b)(5).

NMFS' treatment of hatchery and "naturally spawning" Chinook as two separate stocks of fish violates the Magnuson Act's clear terms and establishes an artificial harvest quota that harms the fishing industry. This Court should address this important question in order to ensure that NMFS "promote[s] domestic commercial and recreational fishing under sound conservation and management principles" as Congress intended. *See* 16 U.S.C. § 1801(b)(3).

CONCLUSION

For the reasons contained herein, the Fishermen respectfully ask that this Court grant their Petition for Writ of Certiorari.

DATED: November, 2006.

Respectfully submitted,

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Appendix A–1

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

OREGON TROLLERS ASSOCIATION; Suislaw Fishermen's Association; Thomas Harris; James Moore; Jim Gagnon; John Fraser; Garth Porteur; Stan Jones; Russell Ott; Donald Jacobs; Great American Smokehouse and Seafood Company; Cap'n Zach's Crab House; Zack Rotwein; Pat Houck; Dan Morris,

Plaintiffs- Appellants,

v.

Carlos M. GUTIERREZ, Secretary of the United States Department of Commerce; National Marine Fisheries Services; William T. Hogarth, NMFS Director; D. Robert Lohn, NMFS Regional Director for the Northwest Region,

Defendants-Appellees,

Yurok Tribe; Hoopa Valley Tribe,

Defendants-Intervenors-Appellees.

No. 05-35970.
Argued and Submitted May 1, 2006.
Filed July 6, 2006.

* * *

Before: JOHN T. NOONAN, A. WALLACE TASHIMA, and W. FLETCHER, Circuit Judges.

WILLIAM A. FLETCHER, Circuit Judge:

The 250-mile Klamath River originates in eastern Oregon and empties into the Pacific Ocean at Crescent City, California. The Klamath River fall chinook, an anadromous salmon species, begin life in the river's upper reaches and tributaries, either in hatcheries or in the wild. As juveniles the Klamath chinook migrate to sea and spend much of their lives in the Klamath Management Zone, an area off the coasts of California and Oregon. At age 3, 4, or 5, they return, usually to their natal tributaries or hatcheries, to spawn and die.

In early 2005, the National Marine Fisheries Service ("NMFS") projected that a critically low number of Klamath chinook would escape that season's harvest to survive and to spawn in the wild. To increase the projected number of wild-spawning Klamath chinook, the NMFS adopted fishery management measures that substantially limited commercial and, to a lesser extent, recreational fishing in the Klamath Management Zone for 2005.

Plaintiffs, who include fishermen, fishing-related businesses, and fishing organizations, filed this action against the NMFS and other governmental entities to challenge the 2005 management measures. Plaintiffs allege that the measures conflict with a number of substantive and procedural requirements set forth in the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 *et seq.* The district court granted summary judgment to defendants, and we affirm.

Appendix A–3

I. Introduction

The events at issue in this dispute unfolded in early 2005 against a complicated regulatory backdrop. We first describe in general terms the regulation of Pacific fisheries under the Magnuson Act. We then turn to the specific facts of this case.

A. Regulatory Background

1. The Magnuson Act and Fishery Management Plans

Congress passed the Magnuson Act in 1976 in order "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States . . . ." 16 U.S.C. § 1801(b)(1). The statute established eight Regional Fishery Management Councils, including the Pacific Fishery Management Council ("PFMC" or "the Council"). *Id.* § 1852(a)(1)(F). The councils, composed of federal and state officials as well as private experts appointed by the NMFS, draft "fishery management plans" ("FMPs"), *id.* § 1852(h)(1), that are designed to "achieve and maintain, on a continuing basis, the optimum yield from each fishery[.]" *Id.* § 1801(b)(4). The councils also propose regulations implementing these FMPs to the Secretary of Commerce. *Id.* § 1853(c). Acting through the NMFS, the Secretary reviews FMPs and their implementing regulations for consistency with the Magnuson Act, solicits public comment, and publishes final regulations in the Federal Register. *Id.* § 1854(a)(1)(B), (b)(1).

2. The Pacific Coast Salmon Plan

In 1977, the NMFS approved the Pacific Coast Salmon Plan ("Pacific Plan"), an FMP for the Pacific salmon fisheries. *See* Pacific Plan 1 (revised Sept. 2003), *available at* http://www.pcouncil.org/salmon/salfmp.html.[1] From 1978 through 1983, the Council recommended annual amendments

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[1] All PFMC documents we refer to are available at the Council's website, http://www.pcouncil.org

to the Pacific Plan based on yearly "salmon abundance estimates and social and economic factors affecting the fisheries." 49 Fed. Reg. 43679, 43679 (Oct. 31, 1984). This process, which required notice-and-comment and other procedures, proved "too cumbersome to allow for timely implementation of the annual regulations and efficient fishery management." Pacific Plan at 1. In 1984, the Council therefore proposed a "comprehensive framework amendment" to the NMFS. Pacific Plan at 1. The 1984 amendment established consistent terms for salmon regulation that would apply every year, and it provided a "mechanism for making preseason and inseason adjustments in the regulations without annual amendments to the FMP. 49 Fed. Reg. at 43679. Shortly thereafter, the NMFS approved the amended Pacific Plan and promulgated implementing regulations, now codified at 50 C.F.R. §§ 660.401-411.

The amended Pacific Plan includes fixed measures, which can only be changed through formal rulemaking, and allows for flexible measures, which change from year-to-year based on fishery conservation and management needs. *See Nw. Envtl. Def. Ctr. v. Gordon,* 849 F.2d 1241, 1243 (9th Cir. 1988). "Fixed measures" include "the procedures and schedules for making preseason and inseason adjustments to the regulations." "Flexible measures" include "determinations of the annual allowable levels of ocean harvests . . . ." 49 Fed. Reg. 32414, 32414-15 (Aug. 14, 1984) (proposed rule).

One of the most important features of the Pacific Plan's management of Klamath chinook is its "spawning escapement goal." "For natural stocks, the escapement goal is defined as the number of spawning adults needed to produce the maximum number of juvenile salmon that, after incubation and freshwater rearing, will out-migrate to the sea . . . . For hatchery stocks, the escapement goal is that number of spawners needed to meet a hatchery's agreed-upon artificial production plan." *United States v. Washington,* 774 F.2d 1470, 1473 n.2 (9th Cir. 1985).

The NMFS first adopted a spawning escapement goal for the Klamath chinook in 1985. It required the agency to design annual management measures such that, by 1998, 115,000 Klamath chinook, including 97,000 natural spawners, would escape to spawn. *See* 50 Fed. Reg. 812, 813 (Jan. 7, 1985).

In December 1988, the Council, "[f]aced with declining run sizes," proposed an amendment to the Pacific Plan that would set the escapement goal at "35 percent of the potential adults from each brood of natural spawners, but no fewer than 35,000 naturally spawning adults in any given year." Hatchery spawners would not count toward this goal. The NMFS adopted this amendment to the Pacific Plan and implemented it in a regulation promulgated on May 4, 1989. The regulation has remained in effect, with minor adjustments, since then. *See* 54 Fed. Reg. 19185, 19194 (May 4, 1989); 54 Fed. Reg. 19798, 19800 (May 8, 1989) (lowering the percentage to 33-34%).

3. Annual Management Measures

The process for setting the "flexible" annual management measures for Pacific salmon fisheries begins in January, when the Council releases a report describing abundance levels for the previous year's salmon stocks. *See* PFMC, *Council Operating Procedure: Preseason Mgmt. Process* (rev. Mar. 11, 2005). In February, the Council drafts Preseason Report I, which makes "stock abundance forecasts and harvest and escapement estimates [for the coming season] when recent regulatory regimes are projected on current year abundance." *Id.* In early March, the Council meets in public to discuss various management options for the coming season in that year. It then releases Preseason Report II, which proposes "not more than three alternative regulatory options" to meet "FMP management objectives." *Id.* The Council holds public meetings on the proposed salmon management options in late March. After receiving comments from the public, the Council chooses from among the options at its early April meeting.

Most of that meeting is open to the public. *See* Pacific Plan at 9-1. The Council then forwards its proposed management measures to the NMFS for final approval. Annual management measures for the Pacific salmon fisheries are published in final form in the Federal Register in early May.

B. Klamath Chinook and 2005 Management Measures

Klamath River salmon have suffered dramatically in recent years. In the spring of 2002, thousands of juvenile salmon died in the river before reaching the ocean. That fall, 34,000 mature chinook, coho, and steelhead died in the river's lower 20 miles as they tried to swim upstream. The proliferation of a salmon parasite, exacerbated by low water levels caused by drought and irrigation use, may have caused this mass fish kill. *See* U.S. Fish & Wildlife Serv., *Klamath River Fish Die-Off September 2002: Causative Factors of Mortality,* Exec. Summary at ii (Nov.2003), *available at* http://www.fws.gov/sacramento/ea.

Problems continued in 2004 and 2005. In its *Review of 2004 Ocean Salmon Fisheries,* published in early 2005 ("2004 Review"), the Council reported that the Klamath River run after the 2004 fishing season consisted of 79,000 returning adult chinook, or about 20,000 fewer than its preseason estimate. Of these, only 24,300 were natural spawners. *2004 Review* at 35. Predictions for the 2005 postseason run, when juvenile salmon that had survived the 2002 die-off would return to spawn, were even more dire. Preseason Report I, released in February 2005, concluded that "a repeat of [the 2004 management measures] would be expected to result in fewer than 35,000 natural area adult spawners, and thus, fail to meet the minimum spawner requirement." *2005 Preseason Report I* at 23.

The Council met from March 6 to 11, 2005, to develop proposed options for annual management measures under the Pacific Plan. These proposals appeared in Preseason Report II.

Each proposal recommended drastically restricted fishing in the Klamath Management Zone.

After public hearings in late March, the Council met in early April to adopt its final 2005 recommendations. On the table was a proposal to lower the 35,000 natural spawner escapement floor for Klamath chinook by 3,000 fish in order to spare fishermen a highly restricted season. The proposal was seriously considered by the Council. One councilmember observed that "[m]anaging below the floor could result in overfishing and would require [an] emergency rule." Another insisted that "the risk of reducing the escapement by 3,000 fish was minimal," while a third stated that, in his view, the risk "was worth the potential economic benefit to the fisheries." A fourth councilmember responded that "the management doctrine for the Klamath system was based on the Council's Salmon FMP." "[I]f the Council moved away from its mandates," he argued, "it would contribute to the problems in the Klamath system, which was not in the long-term interest of the Council and the fishermen." The motion to recommend a lowered escapement floor for Klamath chinook natural spawners from the 35,000 number established in 1989 failed by a vote of 7 to 7.

The Council formally proposed its 2005 management measures in Preseason Report III, released shortly after the April meeting. The report acknowledged that its recommended "commercial fishery measures" for the Klamath Management Zone "are substantially more restrictive than in 2004." *2005 Preseason Report III* at 2. For example, commercial fishing in the Oregon portion of the Klamath Management Zone would be closed for all of May, June, July, and August. *Id.* at 3. The Report also acknowledged that recommended "recreational fishery measures are somewhat more restrictive than in 2004." *Id.*

The Council forwarded its proposed management measures to the NMFS. An April 22 NMFS memorandum observed that "during the process of developing final management recommendations for 2005 there was controversy relating to achievement of the Klamath River fall Chinook escapement floor of 35,000 . . . ." It noted that some commercial fishermen had appeared at the April Council meeting to propose that it "consider increasing harvest beyond what was developed" in Preseason Report II. The memorandum recognized that approval of this proposal would have resulted in returning Klamath River chinook natural spawners below the 35,000 fish floor, and stated that "an emergency rule would have been required" to allow for this deviation from the 1989 regulation amending the Pacific Plan. Another NMFS memorandum observed that the restricted season recommended by the Council would yield an expected $33.7 million in income for Pacific salmon fisheries, "down 28% from the 2004 value of $46.8 million, and 74% below the 1976-1990 average."

Declaring that projected shortfalls in numbers of returning salmon made "certain reductions" necessary "in order to achieve the conservation objective of 35,000 natural Klamath River fall Chinook adult spawners," the NMFS adopted the Council's recommendations without change in an action published in the Federal Register on May 4, 2005. 70 Fed. Reg. 23054, 23055 (May 4, 2005). The NMFS did not open a public comment period before publishing its action. Rather, it invoked the Administrative Procedure Act's ("APA") "good cause" exception based on the need to get the action finalized before opening of the fishing season. *See* 5 U.S.C. § 553(b)(B).

There is little doubt that the restricted salmon fishing season under the 2005 management measures imposed significant hardship on Pacific fishing communities. One estimate pegged the loss caused to commercial fishermen and related businesses at $40 million. *See* Stacy Finz & Glen Martin, *Imagine a Year Without Local Salmon,* S.F. Chron.,

Mar. 3, 2006, at A1. Several of the individual plaintiffs in this suit attested to the threats the 2005 management measures posed to their livelihoods.

C. Proceedings Below

Plaintiffs commenced this suit within 30 days of the publication of the 2005 management measures in the Federal Register. Their suit has two parts. First, and most important, they object to the 1989 regulation establishing the 35,000 natural spawner escapement floor for Klamath chinook, under which the 2005 action was taken. Second, they object to the 2005 action on several bases that are independent of the 1989 regulation.

The Hoopa Valley and Yurok Tribes, whose reservations straddle the Klamath River and its tributaries, intervened in support of the NMFS. In a thorough and carefully reasoned opinion, the district court granted the defendants' motion for summary judgment. *See generally Oregon Trollers Ass'n v. Gutierrez*, Civ. No. 05-6165, 2005 WL 2211084, 2005 U.S. Dist. LEXIS 34084 (D. Or. Sept. 8, 2005). The court concluded that plaintiffs' attacks on the 1989 regulation establishing the 35,000 natural spawner escapement floor were barred by the 30-day limitations period of the Magnuson Act. *See* 16 U.S.C. § 1855(f)(1). In the alternative, the district court rejected plaintiffs' claims on the merits, holding that the escapement floor reflected "an eminently reasonable consideration when managing a fishery to maintain its long-term viability." 2005 WL 2211084, at *8, 2005 U.S. Dist. LEXIS 34084, at *31. The district court also upheld the 2005 management measures against plaintiffs' other objections.

On appeal, plaintiffs challenge every aspect of the district court's decision. We disagree with the district court's conclusion that the plaintiffs' attack on the 1989 regulation is barred by the thirty-day statute of limitations contained in 16

U.S.C. § 1855(f)(1). However, we agree with the district court on the merits. We therefore affirm.

II. Statute of Limitations

We review a district court's statute of limitations determination de novo. *Oja v. U.S. Army Corps of Eng'rs,* 440 F.3d 1122, 1127 (9th Cir. 2006). As originally drafted, the Magnuson Act provided that a plaintiff was required to bring suit to challenge a "regulation" within 30 days of its promulgation. Pub. L. No. 94-265, Title III, § 305(d), 90 Stat. 354 (1976). Congress amended this limitations period in 1990. As now set forth in § 1855(f), it reads as follows:

> (1) Regulations promulgated by the Secretary under this chapter *and actions described in paragraph (2)* shall be subject to judicial review . . . if a petition for such review is filed within 30 days after the date on which the regulations are promulgated *or the action is published in the Federal Register* . . . .
>
> *(2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.*

16 U.S.C. § 1855(f) (emphasis added to indicate language added by 1990 amendment).

Three of plaintiffs' six causes of action challenge the 35,000 natural spawner escapement floor as inconsistent with the Magnuson Act. The NMFS added the escapement floor to the Pacific Plan and its implementing regulations in 1989. Defendants contend that under § 1855(f)(1) plaintiffs should have filed their challenge within thirty days of the promulgation of that regulation, and that their suit is therefore sixteen years too late. Plaintiffs in response argue, inter alia, that the 1990

amendment to § 1855(f)(1) renders their challenge to the 1989 regulation timely. For the reasons given below, we agree with plaintiffs.

Before 1990, the Magnuson Act only allowed judicial review of "regulations." A challenge to a "regulation" had to be filed within thirty days of its promulgation. If § 1855(f)(1) were still in its original form, plaintiffs' claim, brought in June 2005, would be clearly time-barred because the NMFS promulgated the regulation implementing the 35,000 natural spawner escapement floor on May 4, 1989. *See* 54 Fed. Reg. at 19194.

The Fourth Circuit addressed the pre-1990 version of § 1855(f)(1) in *Kramer v. Mosbacher*, 878 F.2d 134 (4th Cir. 1989). There, the Secretary of Commerce promulgated a regulation establishing a 2.6 million pound limit for the 1988-89 king mackerel season on July 8, 1988. On October 14, 1988, the Secretary declared that king mackerel were overfished and announced that he would close the recreational fishing season on October 17. On November 18, he announced that the commercial fishing season would close on November 23. On November 10, plaintiffs sued to compel the Secretary to double the total allowable catch of 2.6 million pounds for the 1988 season. *Id.* at 135. They argued that the 30-day limitations period for challenging 2.6 million pound limit did not commence until October 14, when the Secretary announced his intention to close the fishery, rather than on July 8, when he adopted the underlying regulation setting the total catch limit. *Id.* at 137.

The Fourth Circuit concluded that "the thirty day limit commences at the time the regulations are published and that this limit is to be strictly construed." 878 F.2d at 137. The court held that "the Secretary is *required* by the regulations to close a fishery when its quota is reached . . . . As a result, catch limits are in fact put into operation on the date of the

regulation's publication, and not at some later time." *Id.* (citation omitted) (emphasis in original). Because the suit was filed four months after the regulation's promulgation on July 8, the court concluded that it was untimely. *Id.*

Our case mirrors *Kramer*. If we were to apply § 1855(f)(1) as it existed before its 1990 amendment, we would conclude that the statute of limitations for challenging the regulation establishing the 35,000 natural spawner escapement floor expired in June of 1989, thirty days after the promulgation of that regulation. However, Congress amended § 1855(f)(1) in 1990 specifically in order to change the result in *Kramer*. *See* Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 111, 104 Stat. 4436, 4452-53. The House Report makes this intention plain, stating that the 1990 amendment "is a direct response to a portion of the decision of the Fourth Circuit Court of Appeals in *Kramer* . . . ." H.R. Rep. No. 101-393, at 28 (1990).

The text of the amended § 1855(f)(1) provides that a plaintiff may challenge both an action and a regulation under which the action is taken so long as the suit is filed within thirty days of the action's publication in the Federal Register. Section 1855(f)(1) states that "[r]egulations . . . *and* actions . . . shall be subject to judicial review" if a petition for review is filed "within 30 days after the date on which the regulations are promulgated *or* the action is published in the Federal Register[.]" The conjunctive "and"—italicized above—indicates that both regulations *and* actions are reviewable in a timely filed petition. *See Dawson v. City of Seattle,* 435 F.3d 1054, 1063 (9th Cir. 2006) (describing the plain meaning of "and"). The disjunctive "or"—also italicized above—indicates that a petition is timely if it is filed within thirty days of either promulgation of the regulation *or* publication of the action. *See United States v. Tucor Int'l, Inc.*, 238 F.3d 1171, 1179 (9th Cir. 2001) (interpreting the plain meaning of "or"). Thus, as a straightforward textual matter, a petition filed within 30 days of

the publication of an action may challenge both the action and the regulation under which the action is taken.

If additional evidence were needed, the legislative history of the 1990 amendment makes clear that this reading reflects the intent of Congress. The Senate Report accompanying the amendment stated that an affected party is unlikely to challenge a regulation until the regulation has a discernable practical application—that is, until the agency takes an action under the regulation that has a material adverse effect on that party. The short limitations period in the pre-1990 statute, however, made such challenges untimely:

> [A] substantial period may lapse between the time a regulation to implement a fishery management plan is published and the time action is taken by the Secretary pursuant to the regulation. In many instances, it is only when such an action is taken that participants in the fishery can assess whether a petition for judicial review is necessary. The time lapse between publication o[f] a regulation and Secretarial action may deny individuals the opportunity *to challenge regulations* at the point in time when they can determine that such a challenge is necessary.

S. Rep. No. 101-414, *reprinted in* 1990 U.S.C.C.A.N. 6276, 6298 (emphasis added). According to the Report, the 1990 amendment would remedy this problem by "allow[ing] a challenge within 30 days of the time that a Secretarial action is published." *Id.*

The House Report made the same point:

> Under current law, a management plan or regulation can only be challenged in court within 30 days after publication in the Federal Register. Since some management regulations are prospective, this prevents interested parties from challenging those regulations

> at the time they are actually implemented. The amendments made by this subsection will allow a challenge within 30 days of the time that a regulation is implemented.

H.R. Rep. No. 101-393, at 28 (1990). The amendment's sponsor in the House, Representative Jones, added his voice to this chorus. He stated that the amendment would "permit[ ] suit" to challenge a regulation "either when initial management plan regulations are issued or when implementing actions are put into effect." 136 Cong. Rec. H229-06, H240 (Feb. 6, 1990) (statement of Rep. Jones).

Plaintiffs filed suit within thirty days of the publication of the 2005 management measures. Under our reading of § 1855(f) as amended, the publication of these measures was an "action" within the meaning of the statute. Therefore, plaintiffs had thirty days to attack both the action and the 1989 regulation under which the action was taken. The government makes three arguments to avoid this result. None is persuasive.

First, the government argues that plaintiffs waived an argument based on the 1990 amendment to § 1855(f)(1) because they never raised it in the district court. This is not, strictly speaking, true. Plaintiffs did raise this argument, although they did so only during oral argument on summary judgment. To the extent that we need to exercise our discretion to address this otherwise tardy argument, we are willing to exercise it in this case. Because plaintiffs' argument raises a purely legal issue whose resolution requires no further factual development, and because the issue would otherwise reappear in identical form the next time plaintiffs challenge annual management measures, we believe it appropriate to address this issue now. *See A-1 Ambulance Serv., Inc. v. County of Monterey,* 90 F.3d 333, 339 (9th Cir. 1996).

Second, the government argues that our earlier holding in *Norbird Fisheries, Inc. v. Nat'l Marine Fisheries Serv.*, 112 F.3d 414 (9th Cir. 1997), compels us to hold that plaintiffs' challenge to the 1989 regulation is untimely. The government has misread our analysis in *Norbird*. The entirety of our analysis of § 1855(f)(1) in that case was as follows:

> Regulations promulgated by the Secretary under the Magnuson Act are "subject to judicial review" in accordance with the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, "if a petition for such review is filed within 30 days after the date on which the regulations are promulgated." 16 U.S.C. § 1855(f)(1). A separate section of the Magnuson Act confers jurisdiction on the district court "over any case or controversy arising under the provisions of this chapter." 16 U.S.C. § 1861(d). This latter provision is to be read in conjunction with the provision governing judicial review of the regulations. That provision, § 1855(f)(1), deprives the district court of jurisdiction to hear an attack on the regulations if review is not sought within 30 days of their promulgation. *Kramer v. Mosbacher*, 878 F.2d 134, 136-37 (4th Cir. 1989).

112 F.3d at 416. As this passage shows, our analysis in *Norbird* focused only on a challenge brought to a "regulation" under § 1855(f)(1). It did not address a challenge brought to an "action," as distinct from a "regulation." Our citation to *Kramer* underscores this exclusive focus on a "regulation." The 1990 amendment to § 1855(f)(1), specifically designed to overrule the Fourth Circuit's decision in *Kramer*, relaxed the statute of limitations by allowing a challenge to an "action" taken under a "regulation." We did not analyze in *Norbird* the new provision in § 1855(f)(1) allowing challenges to an "action."

Third, and finally, the government argues that plaintiffs' challenge to the 2005 management measures is a challenge to a "regulation," not to an "action." The government has misunderstood the meaning of "action" as that term is used in § 1855(f)(1) and defined in § 1855(f)(2). "Actions" are defined in § 1855(f)(2) as "actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing." There can hardly be a better fit between the 2005 management measures and this definition.

The 2005 management measures "establish the date of closure of a fishery to commercial or recreational fishing" by closing both commercial and recreational fishing for specified periods in specified areas in the Klamath Management Zone. Moreover, the 2005 management measures "are taken . . . under [a] regulation[] which implement[s] a fishery management plan." The regulations implementing the Pacific Plan are set forth at 50 C.F.R. §§ 660.401-411. The regulation in question—the 1989 amendment to the Pacific Plan adding the escapement floor—was initially (and for several years thereafter) expressly included in the Code of Federal Regulations. *See* 50 C.F.R. § 661 Appx. pt. IV(a) (1989); 50 C.F.R. § 660.410(a) (1996). In 2000, the express mention of the 35,000 natural spawner escapement floor was removed from the code, *see* 65 Fed. Reg. 63047, 63050 (2000), but it remains incorporated by reference. 50 C.F.R. § 660.410(a) (2005) (providing that "conservation objectives are summarized in Table 3-1 of the Pacific Coast Salmon Plan"); Pacific Plan at 3-9 (Table 3-1, describing 35,000 natural spawner escapement floor). Thus, the escapement goal is part of the regulations that implement the FMP at issue.

The NMFS adopted the 2005 management measures by following the process the Pacific Plan's implementing regulations prescribes for "actions." Section 660.408, entitled "Annual actions," provides that the "NMFS will annually establish . . . management specifications . . . by publishing *the action* in the Federal Register under § 660.411." 50 C.F.R. § 660.408(a) (emphasis added). That section further states that "[m]anagement specifications are set forth in paragraphs (b) through (n) of this section." *Id.* Paragraph (h) is entitled "Seasons" and provides, in part, that "[c]ommercial seasons will be established or modified taking into account . . . protection of depressed stocks present in the fishing areas." *Id.* § 660.408(h)(2). Thus, management measures that set a season's length are "management specifications," which in turn are "actions."

Finally, the NMFS finalized and published the 2005 management measures pursuant to § 660.411, the mechanism specified in § 660.408 for the publication of "actions." Section 660.411 states that "[a]nnual and certain other *actions* . . . will be implemented by an *action* published in the Federal Register . . . ." 50 C.F.R. § 660.411(a) (emphasis added). The regulation sets forth a "good cause" exception to the notice-and-comment requirement that otherwise applies to "any action." *Id.* § 660.411(b). When it published the 2005 management measures in the Federal Register, the NMFS invoked § 660.411 and its "good cause" exception. *See* 70 Fed. Reg. at 23063.

It is not our job to determine whether the statute of limitations, as it now operates under § 1855(f)(1), is unwise, unfair, or unworkable. That job belongs to Congress. Our task is to interpret the statute. Applying our reading of its plain terms, the 2005 management measures' publication triggered a 30-day period during which plaintiffs could challenge the 1989 regulation establishing the 35,000 natural spawner escapement floor.

III. Merits

A. Standard of Review

We now turn to the merits of plaintiffs' claims. We review the NMFS's construction of the Magnuson Act under the familiar test set forth in *Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). *See NRDC, Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 878 (9th Cir. 2005). We first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842- 43, 104 S. Ct. 2778. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. 2778. So long as the agency's construction is reasonably consistent with the statute, we defer to it. *Id.*; *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002). This test is satisfied if the agency's interpretation "reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent" *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S. Ct. 1759, 114 L. Ed.2d 233 (1991).

The Magnuson Act adopts the APA's standard for judicial review of agency action set forth in 5 U.S.C. § 706(2)(A). 16 U.S.C. § 1855(f)(1). We set aside an agency's regulations if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [.]" 5 U.S.C. § 706(2)(A). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed.2d 443 (1983) (internal quotation omitted).

B. Attacks on the 1989 Regulation

Three of plaintiffs' six claims attack the 1989 regulation establishing the 35,000 natural spawner escapement floor. Plaintiffs claim (1) that the regulation is inconsistent with the Magnuson Act's definition of a "stock of fish" under 16 U.S.C. § 1802(37); (2) that it is inconsistent with the "national standard" under 16 U.S.C. § 1851(a)(2) requiring that management measures "be based upon the best scientific information available;" and (3) that it is inconsistent with the "national standard" under 16 U.S.C. § 1851(a)(3) requiring that, "[t]o the extent practicable, an individual stock of fish shall be managed as a unit." We address these claims in turn.

1. "Stock of Fish" under the Magnuson Act

Plaintiffs' primary claim is that the Magnuson Act forbids the NMFS to distinguish between natural and hatchery spawners for the purposes of Klamath chinook management and conservation. In the view of plaintiffs, the NMFS must count hatchery spawners towards any escapement goal for Klamath chinook. If this were required, an escapement goal would be satisfied much more easily with less restrictive management measures. The practical impact of their argument, plaintiffs hope, is that fishermen would be allowed to catch more salmon in the Klamath Management Zone.

The 1989 regulation, setting a 35,000 natural spawner escapement floor, is designed to ensure that a certain number of naturally *spawning* fish survive, not that a certain number of naturally *spawned* fish survive. There is substantial overlap between the categories of salmon spawning in the wild (naturally spawning) and salmon born in the wild (naturally spawned), but the categories are not identical. Some hatchery-born salmon will spawn in the wild, and some salmon born in the wild will spawn in a hatchery. Consistent with the 1989 regulation, the Council defines natural spawners as "age-three or older fall chinook that spawn outside of the

hatchery environment, regardless of their origin." *Ocean Abundance Projections and Prospective Harvest Levels for Klamath River Fall Chinook, 2005 Season*, at 2 (Feb. 2005), *available at* http://www.pcouncil.org.

Plaintiffs contend that the categories of naturally spawning and hatchery spawning Klamath chinook are part of the same "stock of fish" under the Magnuson Act. In their view, the NMFS may not manage members of the same "stock of fish" separately, or treat them differently for conservation purposes. For the reasons that follow, we disagree.

A "fishery" is defined under the Magnuson Act as

> (A) one or more stocks of fish which *can be treated as a unit for purposes of conservation and management* and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
>
> (B) any fishing for such stocks.

16 U.S.C. § 1802(13) (emphasis added). A "stock of fish" is "a species, subspecies, geographical grouping or *other category of fish capable of management as a unit.*" *Id.* § 1802(37) (emphasis added).

Plaintiffs make two arguments why naturally spawning Klamath chinook are not a separate "stock of fish" within the meaning of § 1802(37). First, they point out that natural and hatchery spawners swim side-by-side in the years between their departure from the river as juveniles and their return as adults. They also point out that the 2005 management measures, in their effort to meet the 35,000 natural spawner escapement floor, limit the overall catch of chinook without distinguishing between natural and hatchery spawners. They argue from these two undisputed facts that natural spawning Klamath chinook are not a "category of fish capable of being managed as a unit"

within the meaning of § 1802(37) and are hence not a "stock of fish."

We see nothing in the Magnuson Act to compel this understanding of the term "stock." A "category" is "any of several fundamental and distinct classes to which entities or concepts belong," or "a division within a system of classification." Merriam Webster's Collegiate Dictionary 180 (10th ed.1998); *see also Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1176 (D.C. Cir. 2003) (considering dictionary definition to determine if agency's interpretation of a statute is reasonable). There is nothing in the Act to suggest that natural spawners are not a "division" or "distinct class," and hence a "category," of Klamath chinook.

The term "stock" is commonly used and generally understood in fisheries management to allow a distinction between natural and hatchery spawners. The NMFS routinely distinguishes between natural and hatchery stocks in other regulatory contexts. *See, e.g.*, 70 Fed. Reg. 37204, 37208 (June 28, 2005) (adopting hatchery policy under ESA). Similarly, a nonpartisan group of scientists established by Congress to propose hatchery policy differentiates between "hatchery stock" and "natural stock" on a regular basis. *See, e.g.*, Hatchery Scientific Review Group, *Hatchery Reform: Principles and Recommendations*, at 17 (Apr. 2004); Hatchery Scientific Review Group, *Hatchery Reform: Report to Congress*, at 35 (Mar. 2006);[2] Hatchery Scientific Review Group, *Hatchery Reform in Washington State: Principles and Emerging Issues*, Fisheries Magazine, June 2005, at 12.

Nor does the phrase "capable of management as a unit" preclude a distinction between natural and hatchery spawners. The NMFS has determined that "the choice of a management

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[2] The Hatchery Scientific Reform Group's reports are available at http://www.lltk.org

unit" may be decided on a number of different grounds; it "depends on the focus of the FMP's objectives, and may be organized around biological, geographic, economic, technical, social, or ecological perspectives." 50 C.F.R. § 600.320(d)(1). This host of possible bases for choosing a "management unit" indicates the term's flexibility. Even assuming that the NMFS managed natural and hatchery spawners separately, plaintiffs do not identify anything in the statute or related regulations that would draw the line for the purposes of defining the appropriate "unit" at the distinction between natural and hatchery spawners.

We also note that although the Magnuson Act does not expressly distinguish between natural and hatchery spawners, a closely related statute does. The Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1996, Pub. L. No. 104-143, 110 Stat. 1338, a statute that regulates fisheries in one of the Klamath River's main tributaries, refers to "naturally reproducing anadromous fish stocks." *Id.* § 3, 110 Stat. 1339. The Senate Report on the statute, discussing a Trinity River hatchery, noted that support for the hatchery should "not impair[ ] efforts to restore and maintain naturally reproducing anadramous [sic] fish stocks . . . ." S. Rep. No. 104-253, at 3 (1996). This clear intent to distinguish between natural and hatchery fish sheds light on Congress's wishes for the Magnuson Act. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738-39, 109 S. Ct. 2702, 105 L. Ed.2d 598 (1989) (Scalia, J., concurring) (declaring that it is a "rudimentary principle[ ] of construction" that "statutes dealing with similar subjects should be interpreted harmoniously").

In short, we see nothing in the Act to prevent the NMFS from regarding naturally spawning Klamath chinook as a "stock" of salmon within the meaning of § 1802(37), and to prevent the agency from adopting protective measures in an FMP to conserve this "stock." Even without the assistance of *Chevron* deference, we would read the Act in this way. Our obligation to give *Chevron* deference to the NMFS's

interpretation of the Act that it is charged to administer removes any possible doubt.

Second, plaintiffs rely on a district court decision interpreting the term "species" in the Endangered Species Act ("ESA") as a basis for interpreting the term "stock" in the Magnuson Act. The ESA requires the NMFS to protect "endangered" or "threatened species." 16 U.S.C. § 1531(b). A "species" under the ESA includes "any distinct population segment . . . of any species of . . . fish . . . which interbreeds when mature." *Id.* § 1532(16). In *Alsea Valley Alliance v. Evans,* 161 F. Supp. 2d 1154 (D. Or. 2001), the plaintiffs challenged the NMFS's decision to list naturally spawning coho salmon as "threatened." In making this determination, the agency ignored hatchery-spawning coho. *See* 63 Fed. Reg. 42587, 42589 (1998). The district court held that the listing of naturally spawning coho as "threatened" without regard to hatchery-spawning coho was arbitrary and capricious. In the view of the district court, hatchery-spawned coho populations are part of the same distinct population segment as natural coho populations, and "[l]isting distinctions below that of . . . a [distinct population segment] of a species are not allowed [.]" 161 F.Supp. 2d at 1162.

We did not review the district court's decision in *Alsea* on the merits. *See Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181 (9th Cir. 2004) (dismissing appeal on jurisdictional grounds). But even if the district court in *Alsea* was correct in its interpretation of the ESA (which we do not decide), its decision is not relevant to the question before us. The ESA and the Magnuson Act use different terminologies. The ESA refers to "species," while the Magnuson Act refers to "stock." There is nothing in the ESA, or in the district court's decision in *Alsea*, that even remotely suggests that "species" and "stock" have the same definition.

2. "Best Scientific Information Available"

Fishery management plans and their implementing regulations must be consistent with "national standards" for fishery management set forth in 16 U.S.C. § 1851(a). A regulation implementing a FMP will be upheld under § 1851(a) unless the Secretary has acted in an "arbitrary and capricious manner promulgating such regulations." *Alliance Against IFQs v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996) (internal quotation omitted). Stated another way, we will uphold a regulation against a claim of inconsistency with a "national standard" under § 1851 if the Secretary had a "rational basis" for it. *Id.; see also Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1071 (9th Cir. 2005).

National Standard No. 2 requires that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). Plaintiffs argue that there is no scientific basis to support an escapement goal that counts only natural spawners as relevant for conservation purposes. However, plaintiffs frame their argument purely in terms of statutory interpretation. They did not introduce any evidence to dispute the scientific basis for the escapement goal. In effect, plaintiffs would have us construe National Standard No. 2 to require as a matter of law that all Klamath chinook must receive the same consideration for management and conservation. But the statute regulates fisheries, *see, e.g.*, 16 U.S.C. §§ 1801(b)(4), 1851(a)(1), and fisheries include "one or more stocks of fish." *Id.* § 1802(37). As we have just held, a "stock" may reasonably include only natural spawners.

Even if plaintiffs had attacked the evidentiary basis for the escapement goal established in the 1989 regulation, the distinction between natural and hatchery spawners would pass muster on the record before us. "Where scientific and technical expertise is necessarily involved in agency decision-making,

. . . a reviewing court must be highly deferential to the judgment of the agency." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1174 (9th Cir. 2004). The relevant administrative record for these purposes is the record compiled in 1989 to support the FMP amendment that established the escapement goal. *See* 50 C.F.R. § 600.315(b)(2) (providing that an FMP "must take into account the best scientific information available at the time of preparation"). While the NMFS did not file the 1989 record in this case, the 2005 record contains enough excerpts of that record to allow us to defer to the agency's decisionmaking.

A lengthy analysis conducted in 1986 concluded that the 35,000 natural spawner floor "is needed to protect the production potential of the resource in the event of several consecutive years of adverse environmental conditions." In 1988, the Council found that "[a]n evaluation of available information on the production potential of Klamath River fall chinook indicates that a minimum escapement goal of 35,000 naturally spawning adults must be protected in all years in order to prevent extended periods of low juvenile production." After a time series modeling test, the Council deemed the 35,000 natural spawner escapement floor "sufficient . . . to protect the stock and reduce the risk of prolonged depressed production," and to "provide a high probability of attaining sufficient escapement for hatchery production needs."

There is no evidence in the record that the Council's 1986 and 1988 studies are outdated or flawed. Bereft of any contrary science, plaintiffs' bare allegation that the agency's distinction conflicts with the "best scientific evidence available" fails. *See Nw. Envtl. Def. Ctr. v. Brennen*, 958 F.2d 930, 936 (9th Cir. 1992) (rejecting a "best scientific information available" claim because the challenger "has not pointed to any scientific evidence inconsistent with the Secretary's decision"); *see also Massachusetts v. Daley*, 170 F.3d 23, 30 (1st Cir. 1999) (observing that the challenger may have "forfeited" its

challenge by not proposing any better science). *Cf. Midwater Trawlers Coop. v. Dep't of Commerce,* 393 F.3d 994, 1004 (9th Cir. 2004) (affirming regulation based on best scientific evidence available when "no new information" contradicted the agency's data).

3. "Managed as a Unit"

National Standard No. 3 provides that, "[t]o the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination." 16 U.S.C. § 1851(a)(3). "The purpose of this standard is to induce a comprehensive approach to fishery management" that is not jeopardized when fish live in the waters of more than one jurisdiction. 50 C.F.R. § 600.320(b). As a Senate Committee Report on the Magnuson Act explained, "unity of management, or at least close cooper[at]ion, is vital to prevent jurisdictional differences from adversely affecting conservation practices." S. Commerce Comm. Rep. No. 94-416 (1975), *reprinted in A Legislative History of the Fishery Conservation and Management Act of 1976,* at 685 (1976) ("*A Legislative History*"). To further this goal, "[t]he geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained by political boundaries." 50 C.F.R. § 600.320(b).

The Senate Report used the Klamath salmon to illustrate the problem addressed by National Standard No. 3:

> [A] State-to-State separation of power is not reflective of the migratory habits of fish stocks, but is due to historic and political factors. As a result, inconsistent regulations have often developed. For example, the State of Oregon maintains a salmon hatchery program. Salmon reared in the Oregon program de[s]cend Oregon rivers and later may be found in California waters. These same salmon may then be caught

> legally under the California fishing regulations, but earlier in the season and at a smaller size than it would be legal to catch these fish under Oregon's fishing code. Consequently, management of fishery resources from the national or regional perspective is important to sound conservation practices.

A Legislative History at 684. When a stock of fish is managed in the same manner throughout its geographical range, National Standard No. 3 is satisfied. *See Stinson Canning Co. v. Mosbacher*, 731 F. Supp. 32, 37 (D. Me. 1990) (no violation of National Standard No. 3 when regulation at issue applies to fish "wherever caught").

By defining the Klamath Management Zone to reach from Humbug Mountain, Oregon, to Horse Mountain, California, the Pacific Plan takes into account the migration pattern of the Klamath chinook from the Klamath River to the ocean, and their growth to maturity off the coasts of Oregon and California. Pacific Plan at 6-2. Salmon fisheries throughout this range, off the coasts of both states, are managed in the same manner to ensure that 35,000 natural spawning Klamath chinook escape. *See* Pacific Plan at 3-9 (stating that the Klamath chinook are a "[m]ajor contributor to ocean fisheries from Humbug Mt., OR to Horse Mt., CA" and should be managed accordingly). The 2005 management measures are thus entirely consistent with National Standard No. 3.

C. Attacks on the 2005 Management Measures

Plaintiffs' three remaining claims attack the 2005 management measures themselves. Plaintiffs claim (1) that the management measures are inconsistent with the "national standard" under 16 U.S.C. § 1851(a)(8) requiring that the "importance of fishery resources to fishing communities" be taken into account; (2) that they are inconsistent with the "national standard" under 16 U.S.C. § 1851(a)(10) requiring the NMFS "to the extent practicable" to "promote the safety of

human life at sea;" and (3) that the NMFS improperly invoked a "good cause" provision of the Administrative Procedure Act, 5 U.S.C § 553(b)(B), to justify its decision not to open a public comment period. We take these three claims in turn.

1. "Importance of Fishery Resources to Fishing Communities"

By its explicit terms, § 1851(a) requires only that FMPs and their implementing regulations be consistent with the "national standards." The 2005 management measures are "actions," not "regulations." For purposes of plaintiffs' two claims against the 2005 management measures based on national standards set forth in § 1851(a), we assume without deciding that the standards of that section apply to actions taken under regulations implementing FMPs as well as to the regulations themselves.

National Standard No. 8 provides that

> Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks) take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

16 U.S.C. § 1851(a)(8). Plaintiffs claim that the Council inadequately analyzed the economic impact of its 2005 management measures, and that the NMFS inadequately reviewed the measures for consistency with National Standard No. 8.

The regulation implementing National Standard No. 8 provides that an economic analysis must "identify affected fishing communities and then assess their differing levels of dependence and engagement in the fishery being regulated .... The analysis should discuss each alternative's likely effect on the sustained participation of these fishing communities in the fishery." 50 C.F.R. § 600.345(c)(3). In addition, "[t]he analysis should assess the likely positive and negative social and economic impacts of the alternative management measures, over both the short and the long term, on fishing communities[,]" *id.* § 600.345(c)(4), as well as "identify those alternatives that would minimize adverse impacts on those fishing communities within the constraints of conservation and management goals of the FMP ...." *Id.* § 600.345(c)(5).

In 2004, the Council and the NMFS considered the socio-economic impact of that year's proposed management measures and issued a lengthy report titled an "Environmental Assessment." That assessment discussed various alternatives to measures satisfying the 35,000 natural spawner escapement floor, addressing their short- and long-term impacts on fishing communities. In April 2005, the NMFS concluded that, "[f]or the fisheries to be conducted under the proposed 2005 ocean salmon regulations[,] the analysis from the 2004 [Environmental Assessment] is sufficient to understand the range of options developed and the impacts projected . . . for the 2005 season." The NMFS's "Supplemental Finding of No Significant Impact" updated the Environmental Assessment's conclusions for the 2005 management measures and concluded as follows:

> The overall 2005 community income impact of the commercial fishery is projected to be $33.7 million, down 28% from the 2004 value of $46.8 million, and 74% below the 1976-1990 average. The overall community income impact of the recreational fishery is projected to be $394 million, down 16% from the

> 2004 value of $471 million, and 44% below the 1976-1990 average. Community income impacts projected for both the commercial and recreational fisheries off Washington, Oregon, and California, are well above the disaster levels of the 1994 season.

So long as the agency appropriately updates its analysis under National Standard No. 8, there is no reason why it must start from scratch every year. *Compare N.C. Fisheries Ass'n, Inc. v. Daley,* 16 F. Supp.2d 647, 654 (E.D.Va. 1997) (reliance on previous year's measures without discussion of National Standard No. 8 is improper when the agency had not assessed the previous year's measures for consistency with the standard). Plaintiffs do not identify data missing from the 2004 and 2005 analyses or explain why the analyses in the record fall short of what the Magnuson Act requires. *See Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 470 (1st Cir. 2003). "About the best a court can do" when it reviews the NMFS's performance with respect to National Standard No. 8 "is to ask whether the Secretary has examined the impact of, and alternatives to, the plan he ultimately adopts . . . ." *Id.* We conclude the [sic] that NMFS did not abuse its discretion when it relied on a 2004 analysis, updated for 2005, to review the 2005 management measures for consistency with National Standard No. 8.

2. "Safety of Human Life at Sea"

National Standard No. 10 provides that "[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea." 16 U.S.C. § 1851(a)(10). Plaintiffs contend that, by shortening the fishing season, the 2005 management measures unnecessarily obliged fishermen to go to sea regardless of the weather or other dangers. Thus, according to plaintiffs, the management measures did not, "to the extent practicable," "promote" human safety.

The NMFS addressed safety concerns in an April 2005 memorandum commenting on the Council's recommendations:

> The proposed action is expected to be neutral with respect to health and safety. The proposed regulations are within the range of annual regulations implemented since adoption of the salmon framework plan in 1984 and meet the considerations for weather-related safety and harvest opportunity . . . .

Although cursory, this analysis indicates that the NMFS considered National Standard No. 10 and thus discharged its duty under § 1855(a)(10). As stated by the NMFS memorandum, the 2005 management measures do fall within the "range" of measures that have governed fisheries in past years. *See, e.g.*, 56 Fed. Reg. 21311, 21316 (May 8, 1991) (announcing closure of Klamath Management Zone fishery for all but one month). The fact that the measures are "neutral," and do not affirmatively promote safety, does not mean that they do not promote safety "to the extent practicable." We conclude that the NMFS did not act arbitrarily and capriciously when it assessed the management measures for compliance with National Standard No. 10.

3. "Good Cause" to be Excused from Notice and Comment

Finally, plaintiffs claim the NMFS failed to perform the economic analysis required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 *et seq.* When an agency has an obligation to open a public comment period during the rule-making process, the RFA requires it to prepare a "regulatory flexibility analysis." 5 U.S.C. §§ 603, 604. The "initial regulatory flexibility analysis," published after announcement of the proposed rule, must "describe the impact of the proposed rule on small entities" and discuss "significant alternatives" that accomplish the regulatory objectives while "minimiz[ing] any significant economic impact of the proposed

rule on small entities." 5 U.S.C. §§ 603(a), (c). The "final regulatory flexibility analysis," published with the final rule, must discuss the reasons why the agency adopted the alternative it did. *Id.* § 604(a).

Under the APA, the NMFS must open a public comment period before it adopts annual management measures. *See NRDC, Inc. v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003); *see also* 50 C.F.R. § 660.411(b). The obligation is excused "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); *see also* 50 C.F.R. § 660.411(b). When the agency validly invokes the "good cause" exception, the RFA does not apply. *See A.M.L. Int'l, Inc. v. Daley*, 107 F. Supp.2d 90, 107 (D. Mass. 2000). Citing irreducible time pressure to act before the fishing season began, the NMFS invoked the "good cause" exception when it adopted the 2005 management measures. *See* 70 Fed. Reg. at 23063.

We recently addressed the "good cause" exception in *NRDC, Inc. v. Evans*, a case similar to this one in several respects. There, the plaintiffs argued that the NMFS's failure to provide a public comment period invalidated annual management measures that implemented a groundfish FMP. 316 F.3d at 907-08. The NMFS did not open a public comment period and instead invoked the "good cause" exception under 5 U.S.C. § 553(b)(B). It explained that "'[d]elay in implementation of the measures'" to allow the public to comment "'could upset [the] balance'" between conservation and harvest exploitation "'and cause harm to some stocks . . . .'" *Id.* at 908 n.4 (quoting 66 Fed. Reg. 2338, 2371-72 (Jan. 11, 2000)). The NMFS stated that it could not have started the rulemaking process earlier because "'[m]uch of the data necessary for these specifications and management measures came from the current fishing year.'" *Id.* The NMFS has

invoked the good cause exception on precisely these grounds each year for the previous decade. *Id.* at 911.

We held that the NMFS had not adequately justified its decision not to open a public comment period. Following *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993), we declared that generic "timeliness considerations of rulemaking on an annual basis cannot constitute good cause." *NRDC*, 316 F.3d at 912 (citing *Cal-Almond*, 14 F.3d at 441-42). The agency must "demonstrate . . . some exigency apart from generic complexity of data collection and time constraints[,]" and it had not done so. *Id.* We took pains to note, however, that we did not need to "determine the precise contours of what constitutes good cause in this context [,]" and that "we [did] not mean to suggest that habitual invocation of the good cause exception is itself improper." *Id.* We concluded in *NRDC* that the "NMFS should be free in future years to show that compliance is impracticable under specific circumstances pertinent to the year at issue." *Id.* at 912.

The district court in this case found that the grounds for the good cause exception were adequately explained. It distinguished our holding in *NRDC* on the ground that the NMFS's statement "contain[s] a great deal more foundational information, as well as season specific bases, than the very general statement in *NRDC*." 2005 WL 2211084, at *13, 2005 U.S. Dist. LEXIS 34084, at *46. We agree with the district court. In *NRDC*, the good cause statement simply asserted that data-gathering and timeliness concerns excused a public comment period. Too long to reproduce in full here, the good cause statement in this case fills nearly a page in the Federal Register, and it thoroughly explains why the NMFS could not solicit public comment before the measures' effective date. *See* 70 Fed. Reg. at 23063. The NMFS justified its decision with specific fishery-related reasons, not generic complaints about time pressure and data collection difficulties. It observed that

the data on which the management measures are based "are not available until January and February because spawning escapement continues through the fall[.]" The Council does not finish its process until early April, and the season must begin on May 1. The NMFS thus has only a month to finalize the Council's proposals. *Id.* "Delaying implementation of annual fishing regulations, which are based on the current stock abundance projections, for an additional sixty days would require that fishing regulations for May and June be set in the previous year without knowledge of current stock status." *Id.*

The NMFS also explained why season-specific measures, which cannot be ready until early May, must be in place by that time:

> [T]he 2005 forecast ocean abundance for Klamath River fall Chinook requires a reduction in the commercial season length from Humbug Mountain, OR, to the Oregon-California Border from being open from May-June 2004 to being closed in 2005. Without these, and similar restrictions in other areas in 2005, the projected Klamath River fall Chinook escapement floor would not be met.

70 Fed. Reg. at 23063. Taken together, the NMFS's explanations set forth the "specific circumstances pertinent to the year at issue" we found missing in *NRDC*. *See* 316 F.3d at 912.

The fact that the NMFS regularly invokes the good cause exception for the Pacific Plan salmon management measures does not render the exception unavailable for 2005.[3] So long as

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[3] *See* 69 Fed. Reg. 25026, 25035 (May 5, 2004); 68 Fed. Reg. 23913, 23922 (May 6, 2003); 67 Fed .Reg. 30616, 30625 (May 7, 2002); 66 Fed. Reg. 23185, 23194 (May 8, 2001); 65 Fed. Reg. 26138, 26146 (May 5, 2000); 64 Fed. Reg. 24078, 24089 (May 5, 1999); 63 Fed.

(continued...)

the NMFS continues to give season-specific reasons for why the good cause exception is needed, its "habitual invocation" is not improper. Because the NMFS properly relied on the "good cause" exception in connection with the 2005 management measures, it did not have an obligation under the RFA to issue a regulatory flexibility analysis.

Conclusion

The publication of the 2005 management measures in the Federal Register was an "action" under the Magnuson Act. It triggered the thirty-day limitations period during which plaintiffs could challenge both the action and the 1989 regulation implementing the Pacific Plan's 35,000 natural spawner escapement floor. The district court therefore erred when it concluded that plaintiffs' claims challenging the escapement floor were time-barred. However, on the merits, we hold that the district court properly rejected each of plaintiffs' challenges to the 1989 regulation and to the 2005 management measures.

AFFIRMED.

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[3] (...continued)
Reg. 24973, 24983 (May 6, 1998); 62 Fed. Reg. 24355, 24366 (May 5, 1997); 61 Fed. Reg. 20175, 20187 (May 6, 1996); 60 Fed. Reg. 21746, 21757 (May 3, 1995); 59 Fed. Reg. 22999, 23011 (May 4, 1994); 58 Fed. Reg. 26922, 26931 (May 6, 1993) (not invoking "good cause" per se but promulgating "emergency rule" and eschewing notice and comment); 57 Fed. Reg. 19388, 19403 (May 6, 1992); 56 Fed. Reg. 21311, 21318 (May 8, 1991); 55 Fed. Reg. 18894, 18906 (May 7, 1990); 54 Fed. Reg. 19798, 19809 (May 8, 1989); 53 Fed. Reg. 16002, 16012 (May 4, 1988); 52 Fed. Reg. 17264, 17273 (May 6, 1987); 51 Fed. Reg. 16520 (May 5, 1986); 50 Fed. Reg. 18672 (May 2, 1985).

Appendix B–1

UNITED STATES DISTRICT COURT,
DISTRICT OF OREGON

OREGON TROLLERS ASSOCIATION, et al.,	**No. Civ. 05-6165-TC**
Plaintiffs,	Filed Sept. 8, 2005
v.	
CARLOS M. GUTIERREZ, et al.,	
Defendants,	
and	
THE YUROK TRIBE and the Hoopa Valley Tribe,	
Intervenor-Defendants.	

* * *

ORDER

COFFIN, Magistrate J.

Plaintiffs—individuals, businesses and organizations who make their living, in full or in part, on the southern Oregon and/or northern California chinook salmon fishery—brought this action to challenge the 2005 management measures for the

Pacific Coast ocean salmon fishery.[1] Plaintiffs allege that in the promulgation of such measures, defendants violated the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"),[2] the Administrative Procedure Act ("APA"),[3] and the Regulatory Flexibility Act ("RFA").[4] Presently before the court are plaintiffs' motion (# 50) for summary judgment, defendants' cross-motion[5] (# 59) for summary judgment, and intervenor-defendant Yurok Tribe's cross-motion (# 65) for summary judgment.[6]

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[1] *Final rule: annual management measures for the ocean salmon fishery,* 70 Fed. Reg. 23,054 (May 4, 2005).

[2] 16 U.S.C. §§ 1801-1883.

[3] 5 U.S.C. §§ 551-706.

[4] 5 U.S.C. §§ 601-612.

[5] The Hoopa Valley Tribe, as intervenor-defendant, has joined in defendants' motion for summary judgment and in fellow intervenor-defendant Yurok Tribe's motion for summary judgment, and has filed supporting briefs. Although I considered the tribes' briefs, because I resolve the issues in the case on the basis of defendants' arguments, I do not specifically address the issues raised by the tribes.

[6] Also before the court is defendants' motion (# 57) to strike what they characterize as plaintiffs' extra-record declarations. That motion is denied. While I will not evaluate the substance of the decisions made by defendants on the basis of material they did not consider in making such decisions, the materials submitted by plaintiffs are nonetheless useful to me in effectively reviewing all of the circumstances surrounding defendants' decision-making. I believe that absent this fuller record, effective judicial review would be impossible. *See Public Power Council v. Johnson,* 674 F.2d 791, 793-95 (9th Cir. 1992). I would also note that I am considering

(continued...)

Appendix B–3

STATUTORY AND REGULATORY BACKGROUND

In 1976, Congress enacted the Magnuson Act as a response to overfishing and inadequate conservation measures that were threatening future commercial and recreational fishing, as well as the survival of a number of species of fish. *See* 16 U.S.C. § 1801(a). The Magnuson Act was to provide for "fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. § 1801(b)(5). Regional Fishery Management Councils were established to exercise stewardship of the fisheries "through the preparation, monitoring, and revision of such plans," in conjunction with the participation and advice of interested parties and after consideration of the social and economic needs of the states. 16 U.S.C. § 1801(b)(5). Ultimately, the Secretary of Commerce ("Secretary"), acting through the National Marine Fisheries Service ("NMFS"), bears responsibility for reviewing the management plans, as well as any amendments thereto, for consistency with ten national standards (set forth in 16 U.S.C. § 1851(a)) and "any other applicable law." 16 U.S.C. § 1854(a)(1)(A). Upon the Secretary's receipt of a plan or amendment, the Secretary commences such a review, and the plan or amendment is concurrently published in the Federal Register. 16 U.S.C. § 1854(a). If, after a 60-day comment and review period, the Secretary approves the plan, implementing regulations are promulgated. *Id.* All plans and implementing regulations must be consistent with the ten national standards for fishery

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[6] (...continued)
defendants' extra-record materials, which they offer "to put this discussion in context." Defendants' Reply (# 76) at 15, n.9.

conservation and management set out in § 301 of the Magnuson Act. 16 U.S.C. § 1851(a).[7]

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[7] The ten standards set forth in § 301 require that:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires and excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent

(continued...)

Similarly, the Secretary is charged with reviewing "proposed regulations" submitted by Regional Councils, to ensure that they are consistent with the applicable fishery management plan and "any other applicable law." 16 U.S.C. § 1854(b). Such proposed regulations are published in the Federal Register for a comment period of 15-60 days, and, upon approval by the Secretary after the close of public comment, are promulgated as final regulations. *Id.* The "proposed regulations" subject to this notice and comment period are those which the Council deems "necessary or appropriate for the purposes of (1) implementing a fishery management plan or amendment : . . and (2) making modifications to regulations implementing a fishery management plan or plan amendment." 16 U.S.C. § 1853(c). Additionally, any "rulemaking" by NMFS is subject to the APA's notice and comment provisions, unless an APA exception applies.

As well as borrowing the APA's notice and comment provisions for rulemaking, the Magnuson Act incorporates the judicial review standards set forth in the APA. Those standards call for the court to "hold unlawful and set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Midwater Trawlers Co-op v. Dept. of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002).

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[7] (...continued)
practicable, minimize adverse economic impacts on such communities.

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

(10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

NMFS has also promulgated advisory guidelines based on the ten national standards. *See* 50 C.F.R. §§ 600.305-340.

Stemming from agencies' APA obligations are further analyses that must be undertaken pursuant to the RFA. Under § 603 of that Act, any time an agency is required by the APA to publish a general notice of proposed rulemaking, the agency must prepare and make available for public comment an initial regulatory flexibility analysis. Section 604 of the RFA mandates that an agency also prepare a final RFA analysis when the agency, after being required by the APA or other law to publish a general notice of proposed rulemaking, promulgates a final rule.

FACTUAL BACKGROUND[8]

For almost 30 years, the pacific ocean salmon fisheries in the United States' exclusive economic zone have been managed under what is now the Pacific Coast Salmon Fishery Management Plan ("FMP"). After formal amendments to the 1978 FMP (which itself replaced the original 1977 FMP) were proposed, evaluated, and approved each year from 1979 to 1983—a costly and bureaucratically complex annual process which lacked a long-term focus—the Pacific Fishery Management Council ("Council") in 1984 proposed, and the Secretary adopted, a comprehensive framework amendment which replaced the 1978 FMP and established a fixed set of management objectives with flexible elements to allow annual management measures to be tailored to changes in stock abundance and other critical factors. In 1989, Amendment 9 to the FMP was approved, establishing, *inter alia*, an escapement goal of 33-34 percent of potential adult natural spawners for Klamath River fall chinook, with a floor of no less than 35,000

[8] The background set forth is taken from the administrative record on file.

naturally spawning fall chinook.[9] Subsequently, annual management measures for Klamath River fall chinook were required to provide for a minimum escapement of 35,000 naturally spawning fall chinook; each year's measures have since conformed to this objective. Although in most years the 35,000 fish escapement floor has not been the driver of fishing season and catch restrictions—in better years, the objective is an escapement of 33-34 percent of potential adult spawners, and the floor is not a necessary component of that objective—there have been years where the floor necessarily drove the limits.[10]

Examining, with the benefit of hindsight, the 2004 Klamath River chinook season, it is clear that the management objectives were not met and the projections upon which conservation goals were set were woefully inaccurate. The 2004 river run size was predicted to be 96,800 adults, but in actuality turned out to be approximately 79,000 adults, of which only approximately 24,300 returned to spawn in natural areas. Thus, for 2004, the minimum escapement goal was deficient by over 10,000 fish, a full 30 percent of the floor. The age-4 component of the ocean harvest, subject to a 16% harvest limit

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[9] This escapement floor is not subject to annual change. *See* 50 C.F.R. 660.410(b)(1) (providing, in relevant part, that "NMFS is authorized . . . to modify an escapement goal if . . . [a] comprehensive technical review of the best scientific information available provides conclusive evidence that, in the view of the Council, the Scientific and Statistical Committee, and the Salmon Technical Team, justifies modification of a conservation objective; *except that the 35,000 natural spawner floor for Klamath River fall chinook may be changed only through amendment.*") (emphasis supplied).

[10] In 1992, for example, the fishing season was even more restrictive then the measures for 2005 call for, to allow for the 35,000 fish escapement objective to be met.

because of an Endangered Species Act consultation standard,[11] was projected to be 15% of the age-4 stock; the postseason estimate of the actual age-4 harvest, however, was 52.4%, over three times the acceptable harvest percentage. With this data coming in, the Council began to plan for the 2005 management regulations.

In January 2005, the Salmon Technical Team ("STT") [12] and the Council's staff economist met to develop the *Review of 2004 Ocean Salmon Fisheries,* a document which summarized the 2004 seasons, quotas, harvest, escapement, socioeconomic statistics, management goals and achievements, and impacts on ESA-listed species. The preliminary report reflected much of the above-described failure of the 2004 measures to accomplish the required management objectives, including the 35,000 naturally spawning fish escapement requirement. The Klamath River Technical Advisory Team ("TAT")[13] prepared and released two documents examining the 2004 Klamath River fall

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[11] The California coastal chinook is listed as a threatened species under the Endangered Species Act. Because not enough is known about the California coastal chinook stock, the Klamath River fall chinook, which is better understood, is used as a surrogate stock to estimate the health and impact of management measures on the California coastal chinook stock.

[12] The California coastal chinook is listed as a threatened species under the Endangered Species Act. Because not enough is known about the California coastal chinook stock, the Klamath River fall chinook, which is better understood, is used as a surrogate stock to estimate the health and impact of management measures on the California coastal chinook stock.

[13] The Technical Advisory Team is a group which provides biological and statistical expertise to aid the Council in the status of the stocks of anadromous fish (fish, such as salmon, which spend part of their life cycle in a river and the remainder in the ocean) in the Klamath Basin and the impacts of fishery management options.

chinook run and projecting the abundance and prospective harvest levels of Klamath River fall chinook for the 2005 seasons.

In February 2005, the first preseason analysis, *Preseason Report I: Stock Abundance Analysis for 2005 Ocean Salmon Fisheries,* was developed to aid the creation of 2005 fishery management options, and provided, *inter alia*, salmon stock abundance estimates as well as harvest and escapement estimates based on the 2004 management measures. The report estimated that repeating the 2004 management regulations for 2005 would "be expected to result in fewer than 35,000 natural area adult spawners, and, thus, fail to meet the minimum spawner requirement." It further found that repeating the 2004 regulations would result in an ocean harvest rate of greater than 16% of the age-4 Klamath River fall chinook, violating the ESA consultation standard.

Between February 24 and March 6, 2005, the state and tribal agencies went back to their constituents to discuss the preseason reports and range of likely fishery management options. The Klamath Fishery Management Council ("KFMC")[14] also met to prepare recommendations for management options.

From March 6-11, 2005, the Council met in Sacramento, California, to prepare 2005 regulatory options for public review. Among various other meetings and presentations at the conference, the KFMC presented its report, which noted, *inter alia*, that the 2004 season had been the first season in five years to fail to meet the minimum escapement level called for by the

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[14] The Klamath Fishery Management Council is an 11-member federal advisory committee that include members of the commercial and recreational fishing communities, Native American tribes, and state and federal agencies to achieve the development of mutually agreeable harvest and conservation measures.

FMP; NMFS reported on the failure to meet the 16% harvest rate on age-4 chinook, and recommended that the 2005 measures include a buffer to assure that the standard was not exceeded again; and the Hoopa Valley tribe reported that it had been unable to meet its 50% tribal allocation[15] in 2004, but that it supported the escapement floor.

Following the March Council meeting, the STT prepared and disseminated the second preseason report, *Preseason Report II: Analysis of Proposed Regulatory Options for 2005 Ocean Salmon Fisheries.* In the report, four management options were analyzed, including an analysis of the socioeconomic impacts of each proposed option for the various affected coastal regions.

On March 28 and 29, 2005, public hearings were held in Washington, California, and Oregon to review the proposed regulatory options and allow for public comment.[16] [FN16]

From April 3-8, 2005, the Council met in Tacoma, Washington, to finalize 2005 regulatory measures for pacific salmon. The Council heard reports from, *inter alia*, the KFMC, NMFS, the tribes, and the states. The prospect of amending the FMP to allow for fishing below the 35,000 naturally spawning fish escapement floor was discussed, with the Council weighing "the marginal benefit of increasing harvest versus the consequences and action necessary to enact such [a prospect]."

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[15] The FMP, as amended, has adopted the 1993 opinion developed by the Department of the Interior which found that the Yurok and Hoopa Valley tribes have a federally-protected right to the fishery resources of their reservations sufficient to support a moderate standard of living or 50% of the total available harvest, whichever is less.

[16] Public comment was also invited at the April Council meeting in Tacoma.

A motion to consider lowering the escapement floor to 32,000 naturally spawning fish was discussed, but rejected. Amongst others, the Hoopa Valley Tribe supported keeping the 35,000 naturally spawning chinook escapement floor, even though it would result in the tribe suffering the second-lowest harvest on record. Further analysis of the different management options was presented to the Council from a variety of entities, and on April 7, 2005, the Council adopted final regulatory measures to submit to the Secretary, based largely on the STT's Supplemental Report of April 7, 2005, *Salmon Technical Team Analysis of Tentative 2005 Ocean Salmon Fishery Management Measures,* with some modifications. In relevant part, the measures provided for the following Klamath River commercial chinook seasons to be open in post-May 2005:

> (1) From Florence South Jetty, Oregon to Humbug Mountain, Oregon: open from September 1-23, 2005, and October 1-31, 2005;
>
> (2) From Humbug Mountain, Oregon to the Oregon/California border: open from September 3-30, 2005, or until 3,000 chinook are caught;
>
> (3) From the Oregon/California border to Humboldt South Jetty, California: open from September 3-30, 2005, or until 6,000 chinook are caught;
>
> (4) From Horse Mountain, California to Point Arena, California: open from September 1-30, 2005.

As recognized by all parties, these open seasons and catch limits represented decreases from 2004 management regulations.

Following the Council's adoption of the salmon management measures, the STT and Council staff prepared another detailed analysis specifically of the biological and socioeconomic impacts of those measures, *Preseason Report*

III: Analysis of Council Adopted Management Measures for 2005 Ocean Salmon Fisheries. The report detailed changes from the 2004 measures, and specifically noted that the 2005 measures were substantially more restrictive than their 2004 counterparts.

On April 22, 2005, the NMFS regional administrator forwarded the 2005 management measures as approved by the Council to the National Oceanic and Atmospheric Administration ("NOAA") Assistant Administrator for Fisheries, with a request that the measures be approved. The regional administrator summarized the proceedings leading to the adoption of the measures, the main points of contention surrounding the season limits and catch restrictions, and noted that NMFS believed the measures were consistent with the FMP, the Magnuson Act, and all other applicable laws. Further, the administrator included recommendations that the NOAA Assistant Administrator find that good cause existed to waive the APA's notice and comment requirement, on various bases, but primarily on the basis that the additional two months of notice and comment required by the APA would force the regulations to be prepared before the scientific data needed to make the regulations could be collected and analyzed. The NOAA Assistant Administrator adopted the recommended measures, and on May 4, 2005, they were published as final regulations in the Federal Register, and went into immediate effect.[17]

On June 3, 2005, plaintiffs filed the complaint presently before the court, in which they challenge the 2005 management measures promulgated by the Secretary. Plaintiffs seek declaratory and injunctive relief, asking the court to invalidate the regulations on the following bases:

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[17] The public was allowed until May 19, 2005 to submit additional comments on the regulations, however.

(1) That defendants violated the Magnuson Act and the APA because the management objective of obtaining a minimum escapement of 35,000 naturally spawning chinook inappropriately segregates out "naturally spawning" chinook, which are not an anadromous species, a fish, a fishery, or a stock of fish within the meaning of the Magnuson Act;

(2) That defendants violated National Standard Two of the Magnuson Act and the APA when they promulgated management measures which segregate out "naturally spawning" chinook, contrary to the best available scientific information;

(3) That defendants violated National Standard Three of the Magnuson Act and the APA when they promulgated management measures which segregate out "naturally spawning" chinook, therefore failing to manage all the stock as a unit or in close coordination;

(4) That defendants violated National Standard Eight of the Magnuson Act and the APA by failing to adequately analyze the economic impact of their regulations on fishing communities and/or failing to identify alternatives to minimize those impacts;

(5) That defendants violated National Standard Ten of the Magnuson Act and the APA when they promulgated regulations which failed to promote the safety of human life at sea; and

(6) That defendants violated the Regulatory Flexibility Act when they failed to perform a threshold analysis or to certify, pursuant to the RFA, the harvest regulations.

All parties have agreed that the issues presented are appropriately the subject of disposition by summary judgment, and have filed cross-motions to that end.

STANDARD OF REVIEW

As described above, the Magnuson Act incorporated the judicial review standards of the APA. That standard demands that the court set aside agency regulations found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). The court is to determine whether the agency "has considered all the important aspects of the issue and articulated a satisfactory explanation for its action," *Forest Watch v. United States Forest Service*, 410 F.3d 115, 118 (2nd Cir. 2002), including a "rational connection between the facts found and the choice made." *Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 719 (1st Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed.2d 443 (1983)). The court is to consider compliance with applicable law based on the record upon which the decisions were made. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419, 91 S. Ct. 814, 28 L. Ed.2d 136 (1971). If, in promulgating regulations, the agency relied on factors beyond what Congress had charged it with considering, it may be arbitrary and capricious. *Oregon Natural Resources Council v. Daley*, 6 F.Supp.2d 1139, 1145 (D. Or. 1998). However, the court is not considering the issue *de novo*, and cannot simply substitute its own opinion for that of the agency. *Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995). Rather, the question before the court is whether substantial evidence in the record supports the agency's decision. *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 17 (1st Cir. 1999) (noting also the "great deference" warranted agency decisions); *see also Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997).

DISCUSSION

I. *Claims One—Three*

A. *Plaintiffs" first three claims for relief are barred by the statute of limitations.*

Once a final regulation is promulgated by the Secretary, the Magnuson Act provides thirty days for challenges to that regulation. Section 1855(f) of the Act provides, in relevant part, that:

> (1) Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date of which the regulations are promulgated, except—
>
> (A) section 705 of such Title is not applicable; and
>
> (B) the appropriate court shall only set aside any such regulation on a ground specified in section 706(2)(A), (B), (C), or (D) of such Title.
>
> (2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

See also Norbird Fisheries, Inc. v. National Marine Fisheries Service, 112 F.3d 414, 416 (9th Cir. 1997) ("[Section 1855(f)(1)] deprives the district court of jurisdiction to hear an attack on the regulations if review is not sought within 30 days of their promulgation.").

Defendants make the point that in their first three claims for relief, plaintiffs, as a fundamental part of their argument, actually attack not the 2005 regulations but Amendment 9 of the FMP, promulgated in 1989, which sets the 35,000 naturally spawning chinook escapement floor. Thus, defendants argue, plaintiffs' first three claims for relief are time-barred by § 1855(f) of the Magnuson Act, and must be dismissed.

Plaintiffs respond that they are not attacking the 1989 FMP amendment, but rather the 2005 regulations which independently implement the floor. Further, they argue, even accepting that the primary basis of their first three claims for relief is the escapement floor management objective, the challenges are not subject to dismissal because the causes of action did not accrue until there was a concrete and actual injury to plaintiffs triggered by the implementation of regulations, which did not occur until the May 4, 2005 promulgation of the 2005 fishery regulations. Plaintiffs, citing to D.C. Circuit caselaw, attest that they could not have challenged the 1989 amendment setting the escapement objective because, in isolation, that objective imposed no legal harm on them prior to the application of the objectives in later management measures. *See, e.g., Public Citizen, Inc. v. United States Regulatory Comm'n*, 940 F.2d 679, 680 (D.C. Cir.1991) ("Because the intended effect of the policy statement is not clear on its face, and the Commission has yet to employ it in a specific rulemaking or licencing proceeding, we find the challenge unripe.").

I disagree with plaintiffs on both counts. First, it is clear to me that in their first three claims for relief, plaintiffs actual challenge is to the incorporation of the term "naturally spawning" in the setting of the 35,000 chinook escapement floor—an incorporation which occurred in Amendment 9 to the FMP and which was promulgated in 1989. Their challenge, in sum, is that it is arbitrary and capricious for the Secretary to segregate "naturally spawning" salmon from the stock of

salmon as a whole, without regard for whether a given fish spawns at all or where it goes to spawn. However, that issue was not part of the implementation of the 2005 regulations; it was a given that the regulations would incorporate that language because of Amendment 9 to the FMP.

Amendment 9 provided, in relevant part, that the FMP be amended in the following ways:

> [I]n the row for Klamath Fall Chinook, in the second column, the words "97,500 natural; 17,500 hatchery" are revised to read "35 percent of the potential adults from each brood of natural spawners, but no fewer than 35,000 naturally spawning adults in any one year[ ]"; and footnote 3 is revised to read "The minimum escapement floor of 35,000 naturally spawning adults may be modified only by amendment to the FMP."

54 Fed.Reg. 19,194 (May 4, 1989). Thus, pursuant to the FMP as amended in 1989, all future management measures would include a minimum escapement floor of 35,000 naturally spawning Klamath River fall chinook, until that escapement floor was altered by amendment to the FMP.[18] By challenging the "naturally spawning" distinction, plaintiffs' challenge is to the 1989 regulation, not to that promulgated in 2005. Plaintiffs' claims one through three are thus subject to dismissal for failure to file within the 30 day window provided by statute. *See, e.g., Turtle Island Restoration Network v. United States Dept. of Commerce*, 351 F.Supp .2d 1048, 1053-54 (D. Haw. 2005) ("Plaintiffs attempt to frame their claims in turns of violations of the MBTA, APA, ESA, and NEPA, but in actuality Plaintiffs challenge the reopening of the Fishery and for that reason their

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[18] *See also Parravano v. Babbitt*, 837 F.Supp. 1034 (N.D. Cal. 1993). *aff'd* 70 F.3d 539 (9th Cir. 1995).

claims are barred by the 30-day time limit under the MSA . . . . Plaintiffs' claims are not 'pure NEPA' claims as they suggest. Rather, all claims flow from the reopening of the Fishery pursuant to a properly promulgated amendment to the FMP. Therefore, judicial review is limited under 16 U.S.C. § 1855(f), and this Court lacks jurisdiction to adjudicate this matter.") (footnote omitted); *see also Midwater Trawlers Coop. v. Mosbacher*, 727 F. Supp. 12, 14-16 (D.D.C. 1989) ("Although plaintiff's complaint technically challenges the 1989 total allowable catch specifications, plaintiff's real grievance is with the optimum yield set in 1984 . . . . Accordingly . . . because plaintiff's challenge to the 1984 optimum yield cap was not presented within 30 days of the publication of the regulation setting the optimum yield, and because other avenues for seeking judicial review remain open,[19] plaintiff's claim is time barred by the thirty-day statute of limitations[.]").

Further, I do not accept plaintiffs' argument that their challenge to the "naturally spawning" distinction was unripe until the 2005 regulations implemented it. Plaintiffs ignore both the mandatory nature of the FMP's escapement goal and the history of regulations promulgated under it.

Because the FMP, as amended, includes the escapement goal as a mandatory management objective, it must be applied every season until that part of the FMP is amended. Absent such amendment, the agency cannot modify or choose to ignore

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[19] In *Midwater Trawlers,* the court noted that plaintiff could petition the Secretary for an amendment to the optimum yield at issue there, and that should the Secretary reject such a petition, that action would be itself reviewable. I note that plaintiffs here may similarly obtain the relief they seek (or review of the agency's denial of such relief) vis a vis the "naturally spawning" language in the FMP by means of a formal petition to the Secretary. *See, e.g., Clark v. Busey*, 959 F.2d 808 (9th Cir. 1992).

the escapement floor; it forms a fundamental basis upon which the Klamath River fall chinook management measures are implemented. In essence, the only discretion the agency has each year on the issue of the minimum escapement goal is whether or not to seek amendment of the objective. Although it appears from the record that the Council considered this, there is no evidence that there was formal agency action considering and rejecting that prospect.[20] Regardless, plaintiffs do not characterize their claims as challenging such rejection. Because of the mandatory nature of the 1989 amendment to the FMP, plaintiffs have been on notice—actual or constructive—since the amendment was published that the objective of 35,000 naturally spawning chinook escape to spawn was to be applied each year. Even in the absence of an immediate impact, the potential for eventual impact was clear, and a cause of action for judicial review accrued at that time.

Even assuming, *arguendo*, that a cause of action did not accrue until management measures using the escapement goal were promulgated in such a way as to impact plaintiffs, I note that each year's measures since 1989 have indeed been promulgated with consideration of the escapement goal, and that in some years the impacts on commercial fishers have been even greater than they are under the 2005 regulations. In 1992, for example, multiple zones of the affected fishery were closed entirely, whereas under the 2005 regulation they will be open. It is clear that the implementation of the 2005 regulations is not the first opportunity plaintiffs have had to realize that the 1989 escapement goal would impact their ability to commercially catch chinook.

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[20] Again, I note that plaintiffs may themselves petition the Secretary to amend the escapement goal, at which time there would be reviewable agency action.

For all these reasons, I find that the plaintiffs' first three causes of action are fundamentally challenging the 1989 regulations establishing the FMP escapement goals for Klamath River fall chinook, and that the time for bringing challenges to these regulations has long since passed. These claims are dismissed.

B. *Plaintiff's first three claims for relief must fail in any event.*

Even assuming, *arguendo*, that plaintiff's first three claims for relief were not barred by the 30-day statute of limitations in the Magnuson Act, the claims would fail on their merits.

Boiled down to its essence, plaintiffs' arguments amount to analogizing the issues in this case to those before the court in *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001). In *Alsea*, the court concluded that, under the Endangered Species Act, it was arbitrary and capricious for the agency to list only naturally spawned (i.e., wild) coho salmon as "threatened" but to exclude hatchery spawned fish. Specifically, the court found that:

> Listing distinctions below that of a subspecies or a DPS [distinct population segment] of a species are not allowed under the ESA . . . . NMFS concluded that nine hatchery stocks are part of the same Oregon Coast ESU [evolutionarily significant unit]/DPS as the "natural" populations but none of the hatchery stocks were included in the listing decision . . . Once NMFS determined that hatchery spawned coho and naturally spawned coho were part of the same DPS/ESU, the listing decision should have been made without further distinctions between members of the same DPS/ESU.

Id. at 1162. In this case, in contrast, the agency, in setting the escapement floor, did not fail to include hatchery spawned fish

in its determination of what level of escapement was appropriate: the 35,000 fish that must escape can be wild or hatchery spawned, so long as they return up river to *themselves* spawn. There is no distinction made between fish origins, only a distinction made between fish spawning behavior, which is an eminently reasonable consideration when managing a fishery to maintain its long-term viability. Even were *Alsea* to control in this case (which it does not, as it dealt with species listing under the ESA and not stock management under the Magnuson Act) nothing in that case stands for the proposition that an agency is barred from promulgating regulations to protect the ability of a species (or, for that matter, of a stock) to reproduce naturally in the wild. Plaintiffs' interpretation of *Alsea* ignores the importance of naturally spawning runs to the long-term benefit of the species. That is the impact of the "naturally spawning" language of the 1989 regulation—to ensure that the escapement floor consists of fish returning to spawn, and further that they are returning to spawn in an environment where such can occur without human intervention. Such a goal does not run counter to *Alsea*, the Magnuson Act generally, or National Standards Two or Three.

National Standard Two, for its part, directs that the agency promulgate management measures that are based on the best available scientific information. The 1989 regulations amending the FMP to include the escapement floor of 35,000 naturally spawning chinook provided a lengthy rationale for the setting of the floor, as did the reports and analyses informing the Council and the agency during the development of the amendment,[21] and plaintiffs have not demonstrated that the scientific bases underlying the policy were not, and are not, the

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[21] *See, e.g.*, the Klamath River Technical Team's 1986 report, a primary basis for the establishment of the escapement floor which found that a floor of 35,000 naturally spawning fish "would protect the reproductive potential of the stock and not allow it to fall below natural escapement levels observed since 1979."

best available. Indeed, plaintiffs have not provided any scientific data or analyses that suggest that requiring a set of the escaping fish to be wild spawners is not appropriate or desirable.

As to National Standard Three, while that standard instructs that "an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination," the agency has a great deal of discretion in determining what an appropriate "stock" is. The Magnuson Act defines "stock" as "a species, subspecies geographical grouping, or other category of fish capable of management as a unit." 16 U.S.C. § 1802(37). The implementing regulations for determining management units note that "[t]he choice of a management unit depends on the focus of the FMP's objectives, and may be organized around biological, geographic, economic, technical, social, or ecological perspectives." 50 C.F.R. § 600.320(d)(1). Thus, biological, geographic, and ecological considerations in fixing a "stock" are appropriate—and the decision to require an escapement of naturally spawning fish would certainly seem to be acceptable under any of those considerations.

For all these reasons, plaintiffs' challenges to the segregation of "naturally spawning" chinook in setting the escapement floor, even if cognizable, must fail.

II. *Claim Four*

1. *The 2005 regulations do not violate National Standard Eight.*

Plaintiffs' fourth claim for relief alleges that defendants violated National Standard Eight of the Magnuson Act, which requires that the Secretary:

> [T]ake into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such

> communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

16 U.S.C. § 1851(a)(8). Plaintiffs allege that defendants failed to analyze the impact the 2005 regulations would have on fishing communities, and failed to minimize that impact. My review of the administrative record, and my examination of the supplemental materials provided by both sides, convinces me that such is not the case.

As an initial matter, while not dispositive of the question of whether defendants did, in fact, consider the impact to fishing communities in promulgating the 2005 regulations, I note that one of the Council's management objectives is that the Council will:

> Seek to maintain ocean salmon fishing seasons which support the continuance of established recreational and commercial fisheries while meeting salmon harvest allocation objectives among ocean and inside recreational and commercial fisheries that are fair and equitable, and in which fishing interests shall equitably share the obligations of fulfilling any treaty or other legal requirements for harvest opportunities.

Salmon FMP Conservation Objective Three. A footnote to the objective provides that:

> In its effort to maintain the continuance of established ocean fisheries, the Council includes consideration of maintaining established fishing communities. In addition, a significant factor in the Council's allocation objectives . . . is aimed at preserving the economic viability of local ports and/or specific coastal communities[.]

Thus, pursuant to the FMP, the initial parameters for establishing annual management measures include a review of the impact potential measures will have on fishing communities and preserving their economic viability.

Indeed, the record demonstrates that such consideration occurred throughout the process leading to the promulgation of the final 2005 management measures. The commercial take of the 2004 season was one of the first items analyzed, and the impact on commercial fishers and fishing communities of that season were examined. Once the analysis of the 2004 season was completed and potential 2005 regulations were proposed, the impact on fishing communities for each of the four options was considered in detail. The impact to three discrete areas in the region under each option was considered, and compared to both the 2004 season and to the 15 year average for seasons 1976-1990. Although the economic impacts of the regulations could not always be minimized, such minimization did occur where feasible, given the competing conservation objectives.[22] In the Humbug to Horse Mountain region, for example, the reduction from 2004 in the final 2005 regulations was 76% as opposed to one of the options, which called for a 91% reduction. Similarly, in the Horse Mountain to Point Arena area, the 2005 reduction was 77%, as opposed to a proposed 100%.

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[22] Clearly, particularly in projected lean years, the conservation objectives and the fishing community economic objectives are going to be somewhat mutually exclusive. However, recognition of all users' need to preserve the fishery over the long term demands that in such years, conservation of the resource must trump some users' short term economic benefits. Thus the existence, *inter alia*, of the 35,000 naturally spawning chinook escapement floor. As the FMP puts it, "[t]he Council's approach to conservation objectives purposely discourages frequent changes for short-term economic or social reasons at the expense of long-term benefits from the resource."

The bottom line is that it was known by all sides to the debate that the 2005 regulations would have a negative impact on all who derive resources—economic, spiritual, or other—from the fishery.[23] The impact on plaintiffs, clearly, is economic. However, economic hardship by itself is not a basis upon which the court can set aside agency regulations promulgated under the Magnuson Act or the APA. Defendants did their duty under National Standard Eight and the FMP by considering the economic impact of their proposed regulations, and minimized them where possible. Nonetheless, "[t]he purpose of the [Magnuson] Act is clearly to give conservation of fisheries priority over short-term economic interests." *Natural Resources Defense Council v. NMFS*, ___ F.3d ___, 2005 WL 2029863 (9th Cir., Aug.24, 2005). As noted by the Ninth Circuit in a case similar to the one at bar:

> [W]e are not the regulators of the north pacific halibut and sable fish industry. The Secretary of Commerce is. We cannot overturn the Secretary's decision on the ground that some parties' interests are injured . . . . We have authority to overturn the Secretary's decisions only if they are arbitrary and capricious, or contrary to law.

Alliance Against IFQs v. Brown, 84 F.3d 343, 352 (9th Cir. 1996).[24] Here, after reviewing the evaluations and analysis defendants undertook before promulgating the final 2005

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[23] Indeed, once proposed management measures were selected, NMFS even began inquiries to find out whether the measures, once implemented, might qualify the area for a fishery disaster designation.

[24] *See also Associated Fisheries of Maine v. Daley, supra*, 127 F.3d at 118 ("Although we are not unsympathetic to the plight of the individuals who will suffer adverse consequences from the choices embodied in the final rule, we must uphold the balance struck by the Secretary[.]").

management measures, I cannot say that the decision to promulgate them was arbitrary, capricious, or contrary to law. As such, summary judgment on plaintiff's fourth claim for relief must be granted in favor of defendants.

III. *Claim Five*

1. *The 2005 regulations do not violate National Standard Ten*

Plaintiffs' fifth claim for relief alleges that defendants violated National Standard Ten of the Magnuson Act, which provides that the Secretary, in promulgating management measures, "shall, to the extent practicable, promote the safety of human life at sea." 16 U.S.C. § 1851(a)(10). As is the case with standard eight, the goal of standard ten is included as an objective of the FMP. *See* Salmon FMP Conservation Objective Nine.

Pursuant both to National Standard Ten and the FMP conservation objective, NMFS examined whether the 2005 regulations would likely have a significant impact on public safety. It was determined that:

> The proposed action is expected to be neutral with respect to health and safety. The proposed regulations are within the range of annual regulations implemented since adoption of the salmon framework plan in 1984 and meet the considerations for weather-related safety and harvest opportunity of Amendment 8 to the Salmon FMP.

NMFS, Supplemental NEPA Analysis. The specific issue raised by plaintiffs, the safety of commercial fishers, was raised and discussed at the April meeting of the Council, the minutes of which reflect that:

> LTCDR Casad expressed concern for the safety of the fleet associated with the proposed shortened seasons, which may result in fishermen sailing

> during marginal conditions to pursue their limited opportunity.
>
> Mr. Anderson asked if the concern was specific to any one area. LTCDR Casad replied it was a general comment for the development of season structures.
>
> . . .
>
> Mr. Brown asked if the STT could investigate a flexible season structure to accommodate weather related concerns such as those LTCDR Casad spoke of.

Additionally, a member of the Council's advisory team wrote to the Under Secretary of Commerce to express a variety of concerns, including the safety of commercial fishers. The Council, NMFS, and ultimately the Secretary were aware of the issue, but, balancing both the objectives of the FMP and the requirements of the Magnuson Act, made the determination that the 2005 regulations, as promulgated in their final form, were the best way to achieve such goals.[25] [FN25] Plaintiffs have not made any showing that this determination was arbitrary, capricious, or contrary to law, and I do not so find. Summary judgment on plaintiffs' fifth claim for relief is granted in favor of defendants.

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[25] As noted previously, the Secretary necessarily balances objectives when determining what regulations to implement, and is given, both under the judicial review standards and the language of the Magnuson Act, discretion to so balance. *See, e.g., Alliance Against IFQs v. Brown, supra,* 84 F.3d at 349, noting that: "There is a necessary tension, perhaps inconsistency, among the[ ] objectives [of the Magnuson Act]."

IV. *Claim Six*

A. *Defendants did not violate the Regulatory Flexibility Act*

The RFA generally requires agencies to examine the economic impact that regulations it promulgates will have on small businesses and organizations. As such, when an agency is required by law (such as the APA) to publish a notice of proposed rulemaking, it must prepare and make available for comment an initial regulatory flexibility analysis. 5 U.S.C. § 603. Similarly, when a final rule is promulgated, if the agency is required by the APA or other law to publish a notice of proposed rulemaking, it must prepare a final RFA analysis. 5 U.S.C. § 604.

It is apparent that defendants did not specifically conduct or make available formal RFA analyses.[26] [FN26] Thus, the question before the court is whether defendants were required under the RFA to do so. Because defendants properly invoked the "good cause" exception to thc APA's notice and comment provisions, I find that they were exempt from the requirements of the RFA.

Under the APA, an agency may relieve itself of the typical notice and comment obligations imposed by the APA

> when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and

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[26] Defendants do argue, however, that the economic impacts of the regulations on small entities were fully analyzed, and that the substantive, if not technical, requirements of the RFA were thus met. Because I find that defendants were not required to undertake an RFA analysis, I need not consider this argument.

> public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b). In the salmon management regulations, the effect application of this exception will have is detailed:

> If NMFS determines, for good cause, that an action must be filed without affording a prior opportunity for public comment, public comments on the action will be received by NMFS for period of 15 days after filing of the action with the Office of the Federal Register.

50 C.F.R. § 660.411(b).

In the process of promulgating the 2005 salmon management regulations, defendants did avail themselves of the APA's "good cause" exception. Plaintiffs challenge the propriety of invoking this exception, noting that the Ninth Circuit construes this exception narrowly, and relying largely on the recent Ninth Circuit case *Natural Resources Defense Council v. Evans*, 316 F.3d 904 (9th Cir. 2003).

In *Natural Resources Defense Council* (*"NRDC"*), the Ninth Circuit found that NMFS's recitation of good cause was inadequate to waive notice and comment in the promulgation of 2001 management measures for the Pacific Coast groundfish fishery. The good cause statement in *NRDC* read, in full, as follows:

> This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late implementation. Much of the data necessary for

> these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under 5 U.S.C. § 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process . . . . Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register.

Id. at 908 n. 4 (quoting 66 Fed.Reg. 2338, 2371-72). The court found that this statement was a generic statement that did not show that any specific circumstances existed in preparation of the 2001 regulations that warranted application of the "good cause" exception, and reminded that:

> [G]ood cause requires some showing of exigency beyond generic complexity of data collection and time constraints; notice and comment must interfere

> with the agency's ability to fulfill its statutory mandate to manage the fishery.

Id. at 906 (citing *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992) and *Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993)).

However, defendants in the instant action put forth a good cause statement containing a great deal more foundational information, as well as season specific bases, than the very general statement in *NRDC*. The good cause statement here reads as follows:

> The annual salmon management cycle begins May 1 and continues through April 30 of the following year. May 1 was chosen because the pre-May harvests constitute a relatively small portion of the annual catch. The time-frame of the preseason process for determining the annual modifications to ocean salmon fishery management measures depends on when the pertinent biological data are available. Salmon stocks are managed to meet annual spawning escapement goals or specific exploitation rates. Achieving either of these objectives requires designing management measures that are appropriate for the ocean abundance predicted for that year. These preseason abundance forecasts, which are derived from the previous year's observed spawning escapement, vary substantially from year to year, and are not available until January and February because spawning escapement continues through the fall.
>
> The preseason planning and public review process associated with developing Council recommendations is initiated in February as soon as the forecast information becomes available. The pubic planning process requires coordination of

management actions of four states, numerous Indian tribes and the Federal Government, all of which have management authority over the stocks. This complex process includes the affected user groups, as well as the general public. The process is compressed into a 2-month period which culminates at the April Council meeting at which the Council adopts a recommendation that is forwarded to NMFS for review, approval and implementation of fishing regulations effective on May 1.

Providing opportunity for prior notice and public comments on the Council's recommended measures through a proposed and final rulemaking process would require 30 to 60 days in addition to the 2-month period required for development of the regulations. Delaying implementation of annual fishing regulations, which are based on the current stock abundance projections, for an additional 60 days would require that fishing regulations for May and June be set in the previous year without knowledge of the current stock status. Although this is currently done for fisheries opening prior to May, relatively little harvest occurs during that period (e.g., in 2004 less than 10 percent of commercial and recreational harvest occurred prior to May 1). Allowing the much more substantial harvest levels normally associated with the May and June seasons to be regulated in a similar way would impair NMFS' ability to protect weak and ESA listed stocks and provide harvest opportunity where appropriate.

Overall, the annual population dynamics of the various salmon stocks require managers to vary the season structure of the various West Coast area fisheries to protect weaker stocks and give fishers

> access to stronger salmon stocks, particularly hatchery produced fish. Failure to implement these measures immediately could compromise the status of certain stocks or result in forgoing opportunity to harvest stocks whose abundance has increased relative to the previous year thereby undermining the purpose of this agency action. For example, the 2005 forecast ocean abundance for Klamath River fall Chinook requires a reduction in the commercial season length from Humbug Mountain, OR to the Oregon-California border from being open from May-June in 2004 to being closed in 2005. With out [sic] these, and similar restrictions in other areas in 2005, the projected Klamath River fall Chinook escapement floor would not be met. Based upon the above-described need to have these measures effective on May 1 and the fact that there is limited time available to implement these new measures after the final Council meeting in April and before the commencement of the ocean salmon fishing year on May 1, NMFS has concluded it is impracticable to provide an opportunity for prior notice and comment under 5 U.S.C. [§] 553(b)(B).

70 Fed. Reg. 23,054, 23,063. This statement not only describes in detail why the process for promulgating management measures for the Pacific salmon fishery is necessarily too short to allow for traditional APA notice and comment periods and what the consequences of extending that process would be—which would itself be sufficient to meet the requirements of *NRDC* that the agency demonstrate exigency which imperils its ability to fulfill its duties—but the statement points out specific reasons why the agency must invoke the APA exception in *this* year. Thus, neither of the *NRDC* statement's failings—a lack of detail about the need, and a lack of season-specific analysis—are present here. That the agency finds good cause

each season is not, as plaintiffs suggest, evidence that the agency gives short shrift to the annual analysis of the necessity of invoking the waiver; even the *NRDC* court noted that annual good cause findings were not *per se* inappropriate:

> We need not determine the precise contours of what constitutes good cause in this context. We simply hold that NMFS failed to make a sufficient showing that good cause existed for 2001, as the agency did not demonstrate that some exigency apart from generic complexity of data collection and time constraints interfered with its ability to promulgate specifications and management measures.
>
> By the same token, we do not mean to suggest that habitual invocation of the good cause exception is itself improper . . . . NMFS should be free in future years to show that compliance is impracticable under specific circumstances pertinent to the year at issue.

NRDC, supra, 316 F.3d at 912. Because defendants here have sufficiently so shown, I cannot say that their invocation of the good cause exception was improper.[27] As defendants properly invoked the exception, no RFA analyses were necessary. Therefore, summary judgment on plaintiff's sixth claim for relief is granted in favor of defendants.

CONCLUSION

Defendants' motion (# 57) to strike is denied. Plaintiffs' motion (# 50) for summary judgment is denied. Defendants'

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[27] Indeed, my review of the administrative record and examination of the issues presented in this case convinces me that the time frame set out by defendants to create, evaluate and select annual management measures is optimized to allow for meaningful public participation while maximizing defendants' ability to adequately manage the stock as statutorily charged.

cross-motion (# 59) is granted. Intervenor-defendant Yurok Tribe's cross-motion (# 65) for summary judgment is denied as moot. The clerk's office is directed to enter judgment accordingly; this action is dismissed.

(2)

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No. 06-622

IN THE

Supreme Court of the United States

OREGON TROLLERS ASS'N, et al.,

Petitioners,

v.

CARLOS M. GUTIERREZ, et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTERVENOR RESPONDENT HOOPA VALLEY TRIBE'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Hoopa Valley Tribe, a federally recognized Indian tribe with reserved fishing rights in the Trinity and Klamath Rivers, opposes the Petition for a Writ of Certiorari filed by the commercial fishermen. The Tribe intervened on behalf of the respondent United States before the United States District Court for the District of Oregon. The Tribe participated in briefing and oral argument before the District Court and Ninth Circuit Court of Appeals. The Tribe is an intervenor-respondent before this Court.

The commercial fishermen's petition should be denied because there is no conflict between the decision of the Court of Appeals for the Ninth Circuit and a decision of any other United States Court of Appeals, and the decision of the Ninth Circuit Court of Appeals in this case, while critically important to these parties, does not raise an important question of federal law that should be settled by this Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 06-622

In The Supreme Court of the United States

OREGON TROLLERS ASSOCIATION; SUISLAW FISHERMEN'S ASSOCIATION; THOMAS HARRIS; JAMES MOORE; JIM GAGNON; JOHN FRASER; GARTH PORTEUR; STAN JONES; RUSSELL OTT; DONALD JACOBS; GREAT AMERICAN SMOKEHOUSE AND SEAFOOD COMPANY; CAP'N ZACH'S CRAB HOUSE; ZACH ROTWEIN; PAT HOUCK; and DAN MORRIS,

Petitioners,

v.

CARLOS M. GUTIERREZ, Secretary of the United States Department of Commerce; NATIONAL MARINE FISHERIES SERVICE (NMFS); WILLIAM T. HOGARTH, NMFS Director; D. ROBERT LOHN, NMFS Regional Director for the Northwest Region; YUROK TRIBE; and HOOPA VALLEY TRIBE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT YUROK TRIBE'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDING

The parties to this proceeding are as listed in the caption to this Brief in Opposition to Petition for Certiorari. The parties include the respondents, Yurok Tribe and Hoopa Valley Tribe, which were omitted from the petition. Rule 12.6.

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The Respondent, Yurok Tribe, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 452 F.3d 1104 (9th Cir. 2006).

STATEMENT OF THE CASE

Petitioners challenged a regulation adopted by the National Marine Fisheries Service (NMFS) restricting ocean salmon harvests on the Pacific Northwest Coast for the 2005 fishing season. Petition at 8. The regulation was adopted in response to the agency's projection "that a critically low number of Klamath [River] chinook [salmon] would escape that season's harvest to survive and to spawn in the wild." Appendix (App.) A-2.[1] Ocean harvest restrictions for 2005 were crafted to address the fact that "Klamath River salmon have suffered dramatically in recent years." App. A-6.[2]

In seeking this Court's review of the NMFS ocean harvest regulation, the Petitioners have not accurately described the scope of the regulation, and have mischaracterized the record with respect to the regulation's effect on the fishery and fishing communities.

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[1] Citations are to the appendixes contained in the Petition.

[2] The Yurok Indian Reservation straddles the Klamath River from its mouth at the Pacific Ocean, upstream approximately 45 miles to the confluence of the Trinity River. App. A-9. The Yurok Tribe has resided on those lands and fished the Klamath River since time immemorial. The importance of fish, particularly salmon, to the Yurok Tribe cannot be overstated. The Tribe intervened in support of the NMFS ocean harvest restrictions intended to protect and restore the long-term health of the fishery. *See, Parravano v. Babbitt,* 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

NMFS did not "shut down" the Chinook salmon ocean fishing season in 2005. Petition at 23. Nor did NMFS restrict the ocean fishing season "to an unprecedented level, decimating the fishing industry, the Fishermen's livelihoods, and West Coast fishing communities." *Id.* at 26. The facts are far less dramatic than represented to this Court.

Following the 2004 fishing season, NMFS found that Klamath River salmon populations were still in decline. App. A-6. To protect the "long-term interests" of commercial fishers, Indian tribes which harvest those fish in the Klamath River, communities which rely on the fishing industry, and the stocks of fish themselves, NMFS imposed restrictions on ocean harvests in 2005. App. A-7, A-8. In specific locations at specified times, the ocean fishery was nonetheless open. App. B-11. NMFS predicted, and the Petitioners did not dispute, that salmon fishers' income under these restrictions would be $33.7 million, a 28% decline from 2004. App. A-8. The overall fishing community income in 2005 was predicted to be $394 million under the restrictions, down 16% from the previous year. App. A-29. These were not "unprecedented" restrictions. App. B-19 (District Court notes that 1992 ocean zone closures were greater than in 2005). Petitioners incorrectly describe these restrictions on the ocean fishery as a "shut down." Petition at 23. They are incorrect in describing a 16-28% decline in income as a "decima[tion]" of the industry. Petition at 26. The restrictions on ocean fishing were characterized by the Court of Appeals as being between "somewhat" and "substantially" more restrictive than the preceding year. App. A-7.

Petitioners further misstate the record by characterizing the NMFS ocean fishing regulation as one which

"ignor[es] the multitude" or "overwhelming numbers" of hatchery fish in the salmon population. Petition at 24; Petition at Question Presented 2. As the lower court correctly observed, NMFS looked at the entire Chinook salmon population to determine which were hatchery-spawners, and which would spawn in the wild; the agency then calculated the allowable harvest levels on the basis of that entire population. App. A-6 to A-7; B-7 (2004 population consisted of 79,000 adults of which 24,300 spawned in natural areas). The 2005 ocean fishing regulations clearly accounted for the presence of hatchery-spawning salmon.

The Petitioners also fail to note that the development of the regulation they now challenge was an open and public process. The Pacific Fishery Management Council held public hearings, heard testimony from commercial fishermen, weighed various options for management measures, issued pre-season reports on its deliberations, and considered and rejected the relief sought here (a reduction in the minimum number of fish which must be permitted to escape the ocean harvest). App. A-6 to A-7; App. B-8 to B-12. The regulation crafted following these public hearings was implemented without additional public comment. App. A-8. The public, including the commercial fishermen, fully participated in the agency's development of the regulation.

REASONS FOR DENYING THE PETITION

I. Neither the Decision Below Nor the Record Raise the First Question Presented in the Petition

The first question posed by Petitioners is whether a federal agency can "create time constraints that establish

a rulemaking procedure that will never comply with the prior public notice and comment requirements of the Administrative Procedure Act. . . ." The Court of Appeals did not decide that question in this case. Moreover, the record in this case does not contain facts that raise that question or permit the formulation of that question. As a result, this case is not appropriate for this Court's review.

NFMS did not "create" time constraints that enabled it to invoke the impracticability exception to the notice and comment requirements of 5 U.S.C. § 553(b)(3)(B). Rather, as the Court of Appeals explained, the specific facts of the case demonstrate that the fishery stock data on which the management measures were based was not available to NMFS until shortly before the start of the fishing season because of the unique spawning cycles of Pacific Coast salmon. App. A-34. In addition, NMFS could not take final action on the measures until the Pacific Fisheries Management Council (PFMC) completed its recommendations, which did not occur until a month before the fishing season was set to begin. As a result, the time constraints under which NMFS must operate are not of its own making, but are driven primarily by natural forces and which both it and the PFMC must accommodate.

Petitioners' assertion that NMFS adopted a rulemaking procedure here that will "never" comply with the APA notice and comment procedures is simply wrong. Following settled law, the Court of Appeals applied the good cause standard in the context of the unique facts of this case. NMFS must adopt fishery management measures on an annual basis, and cannot, of course, adopt a permanent good cause exception that applies regardless of circumstances. The Panel noted that NMFS' justification for

dispensing with the public comment procedures might be invalid in future years if the agency did not provide "season-specific reasons why the good cause exception is needed." App. A-35.

The Petitioners mischaracterize the holdings below. The Ninth Circuit has not established a new rule of law that requires or authorizes agencies to forgo notice and comment in every case where they are faced with time pressures. On the contrary, the Ninth Circuit previously has struck down NMFS' efforts to invoke time pressures in other cases as the justification for not opening a public comment period. *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429, 441-42 (9th Cir. 1993) (generic timeliness considerations of rulemaking on an annual basis cannot constitute good cause); *Natural Resources Defense Council v. Evans*, 316 F.3d 904 (9th Cir. 2003) (generic complexity of data collection and time constraints are not adequate to justify NMFS' decision not to open a public comment period on measures to regulate taking of groundfish). The Panel in this case was careful to distinguish those cases on their facts. App. A-33, 34. This case, therefore, does not present the question of the lawfulness of a rule that would forever foreclose public comment when time pressures are at play. Because this case does not raise the first Question Presented, review should be denied.

II. There is No Inter-Circuit Conflict On the Proper Standard for Determining Whether the Specific Factual Context Warrants Invocation of the Impracticability Exception to the APA's Notice and Comment Requirements

Petitioners assert this Court's review is needed to ensure uniformity among the circuits concerning the proper standard for invoking the good cause exception to APA notice and comment requirements.[3] Petitioners' perceive a conflict where none exists. Petitioners point to no case in which a court of appeals reached a different result on the same or similar facts. The Ninth Circuit here applied a good cause standard that is uniformly followed by other circuits. There is no reason to believe that should a similar case arise, the result would be any different.

The Court of Appeals ruled that NMFS provided legally sufficient reasons to dispense with the notice and comment procedures under the APA. The court followed an established, narrow, case-by-case pathway that turns on the "specific circumstances pertinent to the year at issue." App. A-33. The Ninth Circuit's standard also requires that the agency "adequately explain[]" the grounds for the good cause exception. App. A-33. This context-specific approach to determining the impracticability prong of the good

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[3] Petitioners' argument that review is warranted because NMFS' rulemaking process conflicts with congressional intent is also unavailing. Even if true, which Respondent Yurok Tribe does not concede, the Court of Appeals' decision upholding NMFS' fishery management measures does not so far depart from "the accepted and usual course of judicial proceedings" so as to call for the exercise of this Court's supervisory power. Rule 10(a). The Court of Appeals has not improperly applied rules of statutory interpretation governing the use of congressional intent.

cause test is in harmony with the approaches of other courts of appeal. *See, e.g., Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983) (adequacy of justification for dispensing with public comment under good cause exception is to be determined under specific circumstances of the case); *American Iron & Steel Institute v. Environmental Protection Agency*, 568 F.2d 284 (3d Cir. 1977) (adequacy of time constraint justification depends on specific facts); *Jifry v. Federal Aviation Administration*, 370 F.3d 1174 (D.C. Cir. 2004) (foregoing public comment justified by specific facts that delay in implementation of new regulation could cause security threat); *Natural Resources Defense Council v. Abraham,* 355 F.3d 179 (2d Cir. 2004) (facts did not justify waiver of notice and comment procedures because emergency was of agency's own making).

Petitioners attempt to manufacture a conflict by misconstruing the applicable law. Petitioners suggest an inconsistency between the law in the Ninth Circuit and the law in other circuits on the question of whether an emergency is required to justify waiver of the public comment requirement. Petition at 18. No court has held, however, that an emergency is the exclusive means by which the good cause exception can be satisfied. Rather, an emergency is a sufficient but not a necessary condition for satisfying the exception. The Ninth Circuit, like other circuits that have considered the question, has held that "[e]mergencies, though not the only situations constituting good cause, are the most common." *Natural Resources Defense Council v. Evans*, 316 F.3d at 911; *see also Jifry v. Federal Aviation Administration*, 370 F.3d at 455 ("The exception excuses notice and comment in emergency situations or where delay could result in serious harm.") (citations omitted). Thus, the Ninth Circuit was correct in

not faulting NMFS for failing to apply an emergency requirement for waiving public comment. The fact that other courts have based a finding of good cause on emergencies does not create a conflict with the Ninth Circuit because there are other factual grounds on which good cause can be based. In essence, Petitioners complain about the application of a properly stated rule, which is not a ground for certiorari review. Rule 10.

Petitioners fare no better in attempting to set up a circuit conflict in the application of the rule that good cause exists when public rulemaking would prevent the agency from carrying out its core functions. Petition at 21-23. Petitioners wrongly say the Ninth Circuit does not follow this rule ignoring that court's express holding to the contrary. *Natural Resources Defense Council v. Evans*, 316 F.3d at 911 ("Under the APA, notice and comment is not 'impracticable' unless the agency cannot both follow section 553 and execute its statutory duties.") (internal quotations and citation omitted). The Ninth Circuit in *NRDC* relies for this proposition on the same First Circuit case Petitioners cite as evidence of a circuit conflict. *Id.* (citing *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983)). Again, the fatal defect with Petitioners' argument is that they complain about the application of a properly stated rule. There is no circuit conflict requiring this Court's intervention.[4]

[4] It is worth noting that none of the various circuit court opinions on which Petitioners rely for the supposed conflict acknowledge that the rule they state and follow varies in any way from the rule applied by other circuits. In fact, the decisions not infrequently rely on cases from other circuits as authority for the applicable rule. *See, e.g., Riverbend Farms v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992) (citing *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983) for proposition that departure

(Continued on following page)

III. The Court of Appeals Correctly Concluded That NMFS' Restrictions on the 2005 Pacific Ocean Fishing Season Were Lawful and Supported by Sound Science

Petitioners argue that in regulating the ocean fishery NMFS "ignor[es] the multitude" of hatchery salmon; simultaneously, the Petitioners argue that NMFS improperly treats hatchery-spawners and natural-spawners as "two separate stocks of fish." Petition at 24, 27. (The Petitioners do not reconcile the inconsistency.) In Petitioners' view, by both ignoring and treating separately hatchery fish, NMFS violates the Act's requirement that the agency manage the fishery "under sound conservation and management principles." *Id.* at 27 (treatment of the two groups as "separate stocks" allegedly violates the Act). The Court of Appeals quite correctly rejected these claims.

The Court of Appeals noted that the Petitioners presented no scientific evidence at all, and certainly none which would contradict the agency's conclusion that a distinction between hatchery spawners and natural spawners was based upon sound science. App. A-21, A-22 (Petitioners "did not introduce any evidence to dispute the scientific basis" for the natural spawner escapement goal); A-25 (noting scientific analyses supporting use of natural spawners as indicia of viability of entire natural and hatchery population); *and see*, B-21 (district court notes "importance of naturally spawning runs to the long-term benefit of the species").

Without scientific support for their claims, Petitioners turn here, as they did below, to the definitions of the words

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from APA procedures is justified when compliance would jeopardize the agency's assigned mission).

used in the Act to shore up their claim that distinguishing hatchery from wild fish was unlawful in managing the fishery. Petition at 24-27. They argue that both hatchery and natural spawners are the same "species" and the same "stock." *Id.* In Petitioners' view, it then followed that NMFS "had no choice but to manage the entire Klamath Chinook stock, . . . , as a unit throughout its management process." *Id.* at 25. The Court of Appeals examined the words used in the Act in light of the unchallenged scientific acceptance of the distinctions between hatchery and wild fish. The court concluded that the agency acted reasonably.

Based upon the Act's definition of "fishery," the Court of Appeals concluded that NMFS could rationally manage hatchery spawners and natural spawners as two stocks of fish capable of being "treated as unit." App. A-20 to -21, *citing* 16 U.S.C. § 1802(13), and A-24. In light of the Petitioners' failure to present a scientific basis for their claim that hatchery and wild fish are identical, and in light of the Act's grant of flexibility to the agency in managing "as a unit" identifiable fish stocks (16 U.S.C. § 1802(13)), the Court of Appeals did not err in upholding the agency's decision to account for both hatchery- and natural-spawners.

Yet Petitioners persist in arguing a strained interpretation of the Act's terms ("species," "stock," and "unit"). Petition at 24-25. Not surprisingly, Petitioners fail to present any scientific evidence for their assertion that the fact that salmon spawns with or without "human intervention" (App. B-21) is "irrelevant." *Id.* at 25. The scientific evidence is contrary to the Petitioners' claims. App. A-25. There is simply no merit to their claims.

Finally, the Yurok Tribe points out that the Petitioners have a sensible alternative forum in which to pursue their claim that hatchery and wild fish are identical. They may petition NMFS for rulemaking, seeking a revision to the conservation objective of 35,000 natural spawners escaping the ocean each year. *See*, www.pcouncil.org/decisions/currentdec.html#salmon (The Pacific Fishery Management Council agreed in November, 2005, to consider amendments to the conservation objective) (last visited November 30, 2006). If such relief were denied, Petitioners would have the right to seek review. *See, Clark v. Busey*, 959 F.2d 808, 813 (9th Cir. 1992).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OREGON TROLLERS ASSOCIATION, ET AL.,
PETITIONERS

v.

CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners challenge a National Marine Fisheries Service rule that set harvest levels for the Pacific Coast ocean salmon fishery, including fall chinook salmon, for the 2005 fishing season. The questions presented are:

1. Whether the agency's finding of good cause to promulgate the rule without prior public notice and comment was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Whether the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, prohibits the agency from limiting harvest levels of naturally spawning fall chinook, as opposed to all fall chinook, including those that spawn in hatcheries.

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In the Supreme Court of the United States

No. 06-622

OREGON TROLLERS ASSOCIATION, ET AL., PETITIONERS

v.

CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 452 F.3d 1104. The opinion of the district court (Pet. App. B1-B35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2006. On September 29, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 3, 2006, and the petition was filed on November 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act or Act), 16 U.S.C. 1801 *et seq.*, provides the legal framework for conserving and managing the Nation's coastal fisheries, preventing overfishing, and rebuilding overfished stocks. 16 U.S.C. 1801(b). To accomplish those goals, the Act establishes eight regional fishery management councils that propose fishery management plans and regulations to "achieve and maintain, on a continuing basis, the optimum yield" from fisheries. 16 U.S.C. 1801(b)(4), 1852(a)(1) and (h)(1). Council proposals must be consistent with ten National Standards set out in the Magnuson Act. 16 U.S.C. 1851(a), 1853(a)(1)(C). Relevant here are the first three standards, which provide:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
>
> (2) Conservation and management measures shall be based upon the best scientific information available.
>
> (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

16 U.S.C. 1851(a)(1), (2) and (3).

The councils submit proposed plans and regulations to the National Marine Fisheries Service (NMFS) for approval. 16 U.S.C. 1852(h), 1854(a)-(b). NMFS must approve council proposals that are consistent with the

Magnuson Act, the fishery plan, and other applicable laws. 16 U.S.C. 1854(a).

2. Since 1977, the ocean salmon fisheries off the coasts of Washington, Oregon, and California have been managed under the Pacific Coast Salmon Plan (the Fishery Plan) developed by the Pacific Fishery Management Council (the Council), which is comprised of fisheries experts nominated by NMFS, state officials from Washington, Oregon, and California, and representatives of commercial, recreational, and tribal fishing interests. See 16 U.S.C. 1852(a); 50 C.F.R. 660.402; *Parravano* v. *Babbitt*, 70 F.3d 539, 543 n.3 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). Under early versions of the Fishery Plan, the Council developed annual management measures by preparing, each year, a proposed amendment to the Fishery Plan, along with a supplemental environmental impact statement and a regulatory impact review and regulatory flexibility analysis. Those documents were then submitted to NMFS for review and approval. See Pet. App. A4.

Because that process lacked long-range perspective and proved to be too cumbersome to permit timely implementation of the annual management measures, the Council proposed and NMFS approved in 1984 a comprehensive fishery plan amendment. 49 Fed. Reg. 43,679; see *NRDC* v. *Evans*, 316 F.3d 904, 907 (9th Cir. 2003). As amended, the Fishery Plan establishes a framework of fixed management objectives combined with flexible elements to allow annual management measures to be varied to reflect changes in stock abundance and other factors without the need for plan amendments. See 50 C.F.R. 660.401-660.411. The Fishery Plan also includes data collection requirements and sets out a schedule and process to be used by the Council and

NMFS in developing and approving annual management measures. 50 C.F.R. 660.408(a); see 70 Fed. Reg. 23,054 (2005).

In 1989, the Council recommended amendments to the Fishery Plan to include a requirement, known as the escapement requirement, that at least 35,000 Klamath River fall chinook escape harvest each year to spawn on natural spawning grounds. The Klamath River fall chinook salmon is a short-lived anadromous fish that reproduces only once, shortly before dying. Klamath River fall chinook hatch in the upper reaches of the Klamath River system, or in one of two hatcheries, and migrate to the Pacific Ocean where they spend most of their adulthood. Adults typically return to their natal river or hatchery to spawn and die at the age of four, though some fish do so at three or five years of age. Both the relative and absolute abundance of fall chinook at those ages can fluctuate dramatically from year to year due to natural and human-caused environmental variation. Pet. App. A2, A6; *Parravano*, 70 F.3d at 542; 70 Fed. Reg. at 23,063. NMFS promulgated the Council's proposed amendment after providing public notice and an opportunity for comment. 54 Fed. Reg. 19,185 (1989).

3. Consistent with the Fishery Plan, the Council developed its proposed 2005 management measures through a series of published reports and public meetings in late 2004 and early 2005. Pet. App. A6-A8. The Council provided multiple opportunities for public comment, and numerous stake-holders—including petitioners, States, Indian Tribes, and recreational and commercial fishers—participated in the Council's process. See *id.* at A6-A8, B9-B11. At a public meeting in early April 2005, the Council proposed management measures designed, among other things, to limit the ocean harvest

of Klamath River fall chinook salmon in order to meet the Fishery Plan's natural-spawner escapement requirement. *Id.* at A7, B10-B11.

4. NMFS approved the Council's proposal on April 28, 2005, two weeks before the start of the 2005 harvest season. 70 Fed. Reg. at 23,056, 23,064. Pursuant to 5 U.S.C. 553(b)(B), NMFS found there was good cause to promulgate the rule without prior public notice and comment. 70 Fed. Reg. at 23,063. Section 553(b) provides that advance notice and comment is not required if "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B).

NMFS explained that the salmon's anadromous lifecycle, combined with potentially large fluctuations in the size of different age classes, creates significant time constraints on the regulatory process. Each year's annual management measures must be based on pre-season abundance forecasts derived from the previous year's observed spawning escapement, but those forecasts vary substantially from year to year and are not available until January and February because spawning escapement continues through the fall. The process is further complicated by the fact that four States, Canada, numerous Indian tribes, the Council, and NMFS all have management authority over these salmon, and the resulting annual management measures impact a variety of groups as well as the general public. 70 Fed. Reg. at 23,054-~~23~~,056, 23,063. Moreover, NMFS found that

> [f]ailure to implement these measures immediately could compromise the status of certain stocks, or result in foregone opportunity to harvest stocks whose

> abundance has increased relative to the previous year thereby undermining the purpose of this agency action. For example, the 2005 forecast ocean abundance for Klamath River fall Chinook requires a reduction in the commercial season * * * [in one area] from being open from May-June in 2004 to being closed in 2005. With out [sic] these, and similar restrictions in other areas in 2005, the projected Klamath River fall Chinook escapement floor would not be met.

Id. at 23,063.

The 2005 harvest measures were published in the *Federal Register* on May 4, 2005, and took effect immediately. 70 Fed. Reg. at 23,054. The agency accepted comments on the measures for 15 days following their publication. *Ibid.*

5. Petitioners filed suit in the United States District Court for the District of Oregon, and the Yurok and Hoopa Tribes intervened as defendants. The district court granted summary judgment for NMFS. Pet. App. B1-B35. It held that NMFS' invocation of the good-cause exception to prior notice and comment was well founded because the agency described in detail "why the process for promulgating management measures for the Pacific salmon fishery is necessarily too short to allow for traditional * * * notice and comment periods and what the consequences of extending that process would be." *Id.* at B33.

Petitioners also claimed that the 2005 harvest regulation violated the Magnuson Act and National Standards Two and Three by distinguishing between natural spawners and hatchery chinook. The district court dismissed those claims as time-barred under the Magnuson Act's statute of limitations, 16 U.S.C. 1855(f)(1) and (2).

Pet. App. B15-B20. In the alternative, the court held that the claims failed on the merits, because (1) nothing in the Magnuson Act prohibited NMFS from approving management measures based on spawning behavior, (2) petitioners had not shown any reason to question the scientific bases for the regulation under National Standard Two, and (3) the regulation's approach to managing this "stock" fell within the broad discretion granted to NMFS under National Standard Three. *Id.* at B20-B22.

6. The court of appeals affirmed. Pet. App. A1-A35. It held that, to invoke the good-cause exception to prior notice and comment, an agency must "demonstrate . . . some exigency apart from generic complexity of data collection and time constraints." *Id.* at A33 (quoting *Evans*, 316 F.3d at 912). Here, the court found that NMFS had "thoroughly explain[ed] why [it] could not solicit public comment before the measures' effective date." *Ibid.* In particular, the court pointed to NMFS' findings that (1) the data on which the management measures were based did not become available until January and February because spawning escapement continued through the fall; (2) the Council's public process for developing proposed annual management measures under the Fishery Plan lasted until early April; and (3) management measures had to be in place by early May so that the spring harvest levels could be based on current data. *Id.* at A33-A34. The court also noted NMFS' finding that delaying promulgation of the 2005 management measures until later in the season would prevent the agency from meeting the Klamath River fall chinook escapement floor. *Id.* at A34.

The court of appeals disagreed with the district court's conclusion that petitioners' attack on the natural spawner escapement floor contained in the 1989 Fishery

Plan amendment was barred by the statute of limitations. Pet. App. A13-A17. But the court affirmed the district court's alternative ruling upholding the natural spawner escapement floor on the merits. It explained that nothing in the Magnuson Act prevents NMFS from distinguishing between naturally spawning and hatchery spawning chinook, and a related statute that regulates fisheries in one of the Klamath River's main tributaries specifically endorses that distinction. *Id.* at A20-A23.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly upheld NMFS' finding that, based on the facts here, the agency had good cause under 5 U.S.C. 553(b) not to provide public notice or opportunity for comment before approving the Council's proposed 2005 management measures.

a. Petitioners repeatedly cite 16 U.S.C. 1854(b)(1) for the proposition that the good cause exception of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, "does not apply in this case because the Magnuson Act requires prior public notice and comment." Pet. 13-14; see Pet. 4, 6, 11, 16, 23. That argument is not properly before this Court, because petitioners did not press it below and the court of appeals did not pass upon it. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Nor do petitioners allege a circuit split concerning the interpretation of the Magnuson Act.

Moreover, petitioners incorrectly assume, without explanation or support, that the 2005 harvest measures were issued under Section 1854(b)(1), and that the APA's good cause exception was therefore inapplicable.

In fact, the 2005 measures were issued under a different section of the Magnuson Act, 16 U.S.C. 1855(d), which grants the Secretary authority "to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter." See 70 Fed. Reg. at 23,063. Under that provision, the Secretary may promulgate regulations "in accordance with section 553 of Title 5," including its good-cause exception. 16 U.S.C. 1855(d).

b. Petitioners contend (Pet. 12, 13) that the time constraints cited by NMFS do not constitute good cause under the APA because they are "artificial." Such a fact-bound question does not warrant this Court's review.

In any event, the court of appeals' ruling is correct. The time constraints faced by NMFS resulted from the salmon's life cycle and the Council's procedural duties under the Fishery Plan. The data necessary to set harvest levels were not available until January or February, and NMFS could not act until the Council made its recommendation following a public hearing process that culminated in early April. Because the salmon harvest season began in early May, the agency had only one month to act—too short a time to permit NMFS to provide public notice and comment before adopting the Council's proposal. Pet. App. A33-A34.

Petitioners do not dispute those facts; instead, their characterization of the resulting time constraints as artificial is based solely on their contention that NMFS provided prior notice on annual harvest regulations for the West Coast salmon fishery between 1978 and 1983. Pet. 13. Petitioners argue that NMFS abandoned that approach merely because it was "too cumbersome," and they assert that "no reason exists now" to prevent

NMFS from resuming its earlier practice. *Ibid.* But petitioners' characterization trivializes the significant problems that led to the adoption of the current Fishery Plan in 1984. See Pet. App. A4; 49 Fed. Reg. at 43,679 (explaining that the prior process lacked long-range perspective and was too complex, costly, and cumbersome to allow for timely implementation of the annual management measures).

Indeed, the annual management measures promulgated by NMFS in 1981, 1982, and 1983 were adopted without prior public notice as emergency interim rules. After each emergency rule took effect, NMFS conducted notice and comment rulemaking on a proposed rule that mirrored the emergency rule, and promulgated a final rule in September or October, when the fishing season was nearly over. See, *e.g.*, 48 Fed. Reg. 45,263 (1983) (final rule replacing emergency interim rule that took effect May 23, 1983); 47 Fed. Reg. 38,545 (1982) (final rule replacing emergency interim rule that took effect June 1, 1982); 46 Fed. Reg. 44,989 (1981) (final rule replacing emergency rule that took effect June 5, 1981). Far from supporting petitioners' argument, NMFS' past experiences confirm the inherent impracticality of conducting notice and comment rulemaking within the time constraints imposed by the salmon's life cycle.

Petitioners also overlook the substantial opportunities they had to comment *before* the Council submitted the 2005 plan to NMFS for approval. NMFS provided prior notice and opportunity for comment when it promulgated the Fishery Plan amendment that established the 35,000 natural spawner escapement floor. 54 Fed. Reg. at 19,185. And every year since then, petitioners and other interested persons have had prior public notice of, and multiple opportunities to comment on, the

annual management measures recommended by the Council to NMFS. Before the Council recommended management measures in 2005, for example, it published preseason reports, accepted written and oral comments, and held public hearings in three States. Pet. App. A6-A8; 70 Fed. Reg. at 23,054-23,055. Further, the management measures adopted by NMFS for 2005 were identical to those adopted by the Council at its April 2005 meeting. Pet. App. A8; 70 Fed. Reg. at 23,054. Thus, the effect of NMFS' invocation of the good cause exception was merely to deny petitioners the opportunity for *additional* prior comment on management measures that had already been subject to comment. Furthermore, petitioners have not identified *any* information that they were prevented from bringing to NMFS' attention, in 2005 or any other year, due to NMFS' invocation of the good cause exemption.

c. There is no circuit split on this question. Petitioners' contrary arguments rest on a mischaracterization of the court of appeals' decision. According to petitioners (Pet. 16, 18), the court of appeals applied a "very lax standard" that permits agencies to invoke the good-cause exception merely by making a "verbose" statement of reasons, rather than by actually demonstrating that prior notice and comment "was indeed 'impracticable.'"

That is not a fair reading of the court of appeals' decision. The court relied on its prior decisions in *NRDC* v. *Evans*, 316 F.3d 904, 912 (9th Cir. 2003), and *Cal-Almond, Inc.* v. *USDA*, 14 F.3d 429, 441-442 (9th Cir. 1993), to stress that good cause requires more than "generic complexity of data collection and time constraints." Pet. App. A33 (quoting *Evans*, 316 F.3d at 912). And it specifically found that NMFS had "thoroughly explain-

[ed] why [it] *could not* solicit public comment before the measures' effective date." *Ibid.* (emphasis added). Petitioners make no effort to explain how the court's conclusion that NMFS "could not" provide prior notice and comment could be premised on mere verbosity, rather than on the actual impracticality of providing prior notice and comment.

Read fairly, the court of appeals' decision is fully consistent with the other decisions cited by petitioners, which apply the same statutory standard to different fact patterns. Petitioners contend that the District of Columbia Circuit finds good cause only in the event of an "emergency" or "imminent hazard." Pet. 17-18 (quoting *Jifry* v. *FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005)). But while *Jifry* involved an imminent hazard, the District of Columbia Circuit noted that the good cause exception also excuses notice and comment in situations where "delay could result in serious harm." 370 F.3d at 1179. As discussed, this case satisfies that standard, because delay in promulgating the harvest measures would prevent them from taking effect at the outset of the harvest season, and could thereby prevent the escapement requirement from being satisfied. In articulating the "serious harm" standard, *Jifry* relied on a Ninth Circuit decision, *Hawaii Helicopter Operators Ass'n* v. *FAA*, 51 F.3d 212, 214 (1995).

Petitioners similarly err in arguing that the decision below is in conflict with decisions of other circuits holding that in order for prior notice and comment to be impractical, an agency must be unable to "execute its statutory duties" while providing such notice and comment. Pet. 21 (quoting *Levesque* v. *Block*, 723 F.2d 175, 184 (1st Cir. 1983)). Far from disagreeing with that stan-

dard, the Ninth Circuit adopted it in *Evans*, and even relied on the First Circuit's *Levesque* decision in doing so. *Evans*, 316 F.3d at 911. Here, in turn, the Ninth Circuit relied on its decision in *Evans*. Pet. App. A32-A33. Thus, petitioners' quarrel is not with the Ninth Circuit's legal standard, but with its application of that standard to the facts of this case—hardly a basis for this Court's review. See Sup. Ct. R. 10. Indeed, petitioners' argument (Pet. 22) that NFMS could both provide prior notice and comment and execute its statutory duties in this context is premised entirely on their inaccurate factual contention, discussed above, that "any time constraint is of NMFS' own creation."

2. Petitioners do not allege a circuit split on the second question presented, which is whether the Magnuson Act precludes NMFS from setting harvest levels that are designed to ensure the survival of a number of naturally spawning fish (as opposed to fish that spawn in hatcheries). Petitioners argue (Pet. 23-27) that NMFS decided to treat all fall chinook as a single stock, and that by doing so the agency somehow precluded itself from establishing an escapement goal for only naturally spawning fall chinook. Even accepting for the sake of argument petitioners' premise that NMFS has chosen to treat all fall chinook as a single stock, petitioners have pointed to nothing in the Magnuson Act that would prevent the agency from establishing an escapement goal for naturally spawning fish, *i.e.*, fish that spawn in nature, without the need for man-made hatcheries. See Pet. App. A20-A23, B21.

Petitioners misstate the record in arguing (Pet. 24) that NMFS arbitrarily restricted fishing by "ignoring the multitude of hatchery Chinook." The record documents that NMFS considered both hatchery spawning

and naturally spawning chinook in promulgating the 2005 harvest measures, and that the natural spawner escapement floor is intended to achieve maximum sustained yield by protecting both natural and hatchery production. Pet. App. A6, B7. In any event, petitioners' disagreement with NMFS' scientific judgment concerning the appropriate way to protect fall chinook does not warrant review by this Court—especially in light of both lower courts' agreement that petitioners presented no evidence to challenge the agency's scientific judgment. *Id.* at A24, B22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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